Supreme Court, U.S.
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No. ____

In The

Supreme Court of the United States

October Term, 1993

AUBURN POLICE UNION, ET AL.,

Petitioners,

v.

MICHAEL E. CARPENTER,
ATTORNEY GENERAL OF THE STATE OF MAINE,

Respondent.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The First Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

Does a Maine statute prohibiting solicitation by any person which would "tangibly benefit" any law enforcement officer, law enforcement agency, or law enforcement association violate the First and Fourteenth Amendments to the United States Constitution?

LIST OF PARTIES

In addition to the Auburn Police Union, the Petitioner named in the caption, the Portland Police Benevolent Association, the Lewiston Police Union, Leonard Dexter, Kevin MacDonald, David B. Chamberlain, R.H. McKnight Company, Inc., and Charles Underwood, are Petitioners in this cause. Michael Carpenter, Attorney General of the State of Maine is the only respondent as indicated in the caption.

RULE 29.1 LISTING

The Petitioner R.H. McKnight Company, Inc. is a privately held Massachusetts corporation with no parents or subsidiaries. The Petitioner Auburn Police Union is a Maine not-for-profit corporation which issues no shares. The Petitioner Portland Police Benevolent Association is a Maine not-for-profit corporation which issues no shares. The Petitioner Lewiston Police Union (a/k/a Local No. 545, International Brotherhood of Police Officers) is a Maine not-for-profit corporation which issues no shares.

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PETITION FOR WRIT OF CERTIORARI

Auburn Police Union, *et al.*, respectfully petition for a writ of certiorari to review the judgment of the United States Court of Appeals for the First Circuit in this case.

OPINIONS BELOW

The opinion of the First Circuit Court of Appeals (Appendix pp. 1a-43a) is reported at 8 F.3d 886. The opinion of the District Court (Appendix pp. 44a-62a) is

reported at 798 F.Supp. 819. The unreported recommended decision of the magistrate judge is printed in the Appendix at pp. 63a-80a.

JURISDICTION

The judgment of the First Circuit Court of Appeals was entered November 12, 1993. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

First Amendment to the United States Constitution.

Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

Fourteenth Amendment to the United States Constitution, Sec. 1.

All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty, or property, without due process of law; nor deny

to any person within its jurisdiction the equal protection of the laws.

25 Me. Rev. Stat. Ann. § 3702-A (1992).

A person may not solicit property from the general public when the property or any part of that property in any way tangibly benefits, is intended to tangibly benefit or is represented to be for the tangible benefit of any law enforcement officer, law enforcement agency or law enforcement association. Any violation of this chapter constitutes a violation of the Maine Unfair Trade Practices Act.

STATEMENT OF THE CASE

This case addresses the constitutionality under the First and Fourteenth Amendments of a Maine statute prohibiting any fundraising solicitation that "tangibly benefits" any law enforcement officer, law enforcement agency, or law enforcement association. 25 Me. Rev. Stat. Ann. § 3702-A provides:

> A person may not solicit property from the general public when the property or any part of that property in any way tangibly benefits, is intended to tangibly benefit or is represented to be for the tangible benefit of any law enforcement officer, law enforcement agency, or law enforcement association. Any violation of this chapter constitutes a violation of the Maine Unfair Trade Practices Act.

The statute can be enforced by injunctive relief and civil penalties.

Petitioners are: three Maine police associations which wish to fund the publication of their magazines and raise money through the solicitation and sale of advertising space to the general public; the publisher who would conduct such solicitation sales and also produce and distribute the magazines; three members of the police groups who are also law enforcement officers; and a private citizen who would like to receive such solicitations and participate by advertising in law enforcement magazines.

In 1977, the Maine legislature first prohibited law enforcement personnel from general public fundraising through enactment of 25 Me. Rev. Stat. Ann. § 3702. This law was amended in 1983 to exempt game wardens in limited circumstances. In 1985, the Maine Supreme Judicial Court, sitting as the Law Court, upheld the constitutionality of the statute in *State v. Maine State Troopers Ass'n*, 491 A.2d 538 (Me. 1985). This Court summarily dismissed an appeal from that decision reported at 474 U.S. 802 (1985).

The Law Court decision in *MSTA* was based upon a finding of the state's compelling interest in avoiding "police coercion" and that such coercion was inherent "in every solicitation on behalf of law enforcement agents." *Id.* at 542-43. The Law Court also found that the statute was narrowly drawn to accomplish this compelling interest. *Id.* at 543. The Law Court, however, did invalidate the statutory exception for game wardens. *Id.* at 544.

In 1989, the Maine legislature again amended the statute, this time to exempt certain activities of the Attorney General (25 Me. Rev. Stat. Ann. § 3706) and permit public fundraising for a memorial to law enforcement personnel killed in the line of duty. (Priv. & Spec. Laws 1989 ch. 47.)

In 1990, Petitioners herein formed a coalition of plaintiffs to file a civil rights action, pursuant to 42 U.S.C. § 1983, challenging the amended statute as unconstitutional under the First and Fourteenth Amendments to the United States Constitution. The resulting decision, *Auburn Police Union v. Tierney*, 756 F.Supp. 610 (D. Me. 1991) ("*Auburn I*") was based upon the adoption by the District Court of the recommended decision of Magistrate Judge David M. Cohen. The court in *Auburn I* (Carter, J.) found the amended statute unconstitutional because the legislature by creating the exceptions had demonstrated that it no longer viewed the avoidance of "police coercion" as a compelling interest. *Id.* at 618. The court accordingly found the statute unconstitutionally overbroad and a prior restraint in violation of the First Amendment and a violation of Plaintiffs' rights to equal protection of the laws under the Fourteenth Amendment.

Responsive to *Auburn I*, the legislature repealed, or allowed to expire, some of the exceptions[1] and amended

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[1] The legislature repealed, or let expire on their own terms, exceptions to the old law which exempted certain activities of the Department of the Attorney General, 25 Me. Rev. Stat. Ann. § 3706 (repealed), and State Warden Service Associations, 25 Me. Rev. Stat. Ann. § 3702 (repealed), exempted the sale by non-law enforcement officers of advertising in promotional and

the statute to provide that fundraising from the general public is illegal if the "property" confers a "tangible benefit" to law enforcement. 25 Me. Rev. Stat. Ann. § 3702-A. The ostensible legislative purpose of the "tangible benefit" clause was to permit police personnel to raise money for charities unrelated to law enforcement, *e.g.*, Special Olympics.

Petitioners, the same plaintiffs as in *Auburn I*, on September 27, 1991, again brought a civil rights action pursuant to 42 U.S.C. § 1983 in the District Court of Maine seeking a declaratory judgment that the amended statute, 25 Me. Rev. Stat. Ann. § 3702-A, was unconstitutional for the same reasons as the predecessor statute. Jurisdiction of the District Court was invoked pursuant to 28 U.S.C. § 1331 and 28 U.S.C. § 1343(a)(3) and (4).

Again, the case was referred to Magistrate Judge Cohen for an advisory opinion, and again the magistrate judge determined the statute was unconstitutional for the same reasons stated in *Auburn I*. (Recommended Decision, Appendix p. 75a.) However, in *Auburn Police Union v. Carpenter*, 798 F.Supp. 819 (D. Me. 1992) (*"Auburn II"*), the district court (Hornby, J.) rejected the magistrate judge's recommended decision. The court found the statute "unconstitutional insofar as it is to be enforced by

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educational publications of the Department of Inland Fisheries and Wildlife, 25 Me. Rev. Stat. Ann. § 3705 (repealed), and exempted solicitation for a memorial to slain police officers, Priv. & Spec. Laws 1989 ch. 47 and Priv. & Spec. Laws 1990 ch. 114 (expired). The legislative amendments however left intact an exemption permitting law enforcement personnel to raise money for purposes of campaigns for public office, 25 Me. Rev. Stat. Ann. § 3703.

injunctive relief, but that shorn of the injunctive remedy the statute is constitutional." 798 F.Supp. 828.

Plaintiffs appealed to the First Circuit Court of Appeals. In an opinion dated November 12, 1993, the First Circuit affirmed the decision of the District Court finding the statute facially constitutional, but reversed the District Court's finding that enforcement of the statute by injunctive relief was unconstitutional. *Auburn Police Union v. Carpenter*, 8 F.3d 886 (1st Cir. 1993). In considering Plaintiffs' overbreadth argument, the First Circuit held that it was bound by this Court's summary dismissal of the appeal in *Maine State Troopers Ass'n v. Maine*, 474 U.S. 802 (1985). The First Circuit also rejected claims that the statute is underinclusive, a prior restraint or violative of the Fourteenth Amendment's equal protection clause.

REASONS FOR GRANTING THE WRIT

This Maine statute is a singular anomaly in its categoric prohibition of solicitation by *any* person for the tangible benefit of law enforcement. This Court's review of the statute is critical to affirm the principle which had previously seemed well established; that content-based discriminations among speakers are the least tolerated regulations of protected speech, and presumptively invalid. The First Circuit, which declined to consider the critical overbreadth issue because of this Court's summary dismissal in *State v. Maine State Troopers Ass'n*, 491 A.2d 538 (Me. 1985), *appeal dismissed* 474 U.S. 802 (1985) has permitted this statute to stand, thereby creating a

precedent which undermines established First Amendment jurisprudence. This decision, if not reviewed by this Court, will indicate tolerance for content-based restrictions on free speech, even when only loosely tailored to achieve a colorable governmental purpose. The opinion of the First Circuit also is discordant with the decisions of the district courts in *Auburn Police Union v. Tierney*, 756 F.Supp. 610 (D. Me. 1991) and *Telco Communications v. Barry*, 731 F.Supp. 670 (D.N.J. 1990), which creates the danger of confusion among other courts and state legislatures.

This Court has consistently held that the solicitation of support is protected under the First Amendment guarantee of freedom of speech. *Riley v. National Fed'n of the Blind*, 487 U.S. 781 (1988); *Secretary of State of Maryland v. J. H. Munson Co.*, 467 U.S. 947 (1984); *Village of Schaumburg v. Citizens For A Better Environment*, 444 U.S. 620 (1980). Similarly, selling books and magazines containing significant "pure speech," as Petitioners propose to do, is protected activity. *Murdock v. Pennsylvania*, 319 U.S. 105 (1943). Likewise, the right to solicit advertising incident to protected speech is a constitutionally protected activity. *Grosjean v. American Press Co.*, 297 U.S. 233 (1936). Lower courts have held that solicitation for the benefit of police groups is also fully protected activity. *Telco Communications, Inc. v. Carbaugh*, 885 F.2d 1225, 1230 (4th Cir. 1989); *Telco Communications v. Barry, supra*, 731 F.Supp. at 677. The Maine statute, which imposes a ban on law enforcement solicitation with preferential exceptions, is a content-based restriction on fully protected speech.

I. THE STATUTE IS UNCONSTITUTIONALLY OVERBROAD

Content-based regulations of speech are presumptively invalid. *R.A.V. v. City of St. Paul*, ___ U.S. ___, 112 S. Ct. 2538, 2542 (1992); *Simon & Schuster, Inc. v. Members of New York State Crime Victims Board*, ___ U.S. ___, 112 S. Ct. 501, 508 (1991). Since the statute focuses not on the *solicitor*, but rather the *beneficiary* of the solicitation, it is clearly content-based. As the statute also constitutes "a direct restriction on the amount of money a charity can spend on fundraising activity," it is therefore "a direct restriction on the charity's First Amendment rights." *Munson*, 467 U.S. at 967, n.16. The Maine statute is therefore subject to "exacting First Amendment scrutiny." *Riley v. National Fed'n of the Blind*, 487 U.S. 781, 788 (1988).

As this Court stated in *Burson v. Freeman*, ___ U.S. ___, 112 S. Ct. 1846 (1992), "the First Amendment's hostility to content-based regulation extends not only to a restriction on a particular viewpoint, but also to a prohibition of public discussion of an entire topic." *Id.* at 1850. *Burson* defines the rule of "exacting scrutiny" as follows:

> The State must show that the "regulation is necessary to serve a compelling state interest and that it is narrowly drawn to achieve that end." *Perry Education Ass'n. v. Perry Local Educators' Assn.*, 460 U.S., at 45. *Accord, Board of Airport Comm'rs. of Los Angeles v. Jews for Jesus, Inc.*, 482 U.S. 569, 573 (1987); *Cornelius v. NAACP Legal Defense and Ed. Fund, Inc.*, 473 U.S. 788, 800 (1985); *United States v. Grace*, 461 U.S., at 177.

Id. at 1851. *Riley* affirms the need for a compelling state interest to justify limits on charitable solicitations and for

"precisely tailored" restrictions if a compelling interest is found. 487 U.S. at 800. More recently, the Court described the ability of the government to regulate the content of constitutionally protected speech in order to promote a compelling interest, but only "if it chooses the *least restrictive means* to further the articulated interest." *Sable Communications of California, Inc. v. F.C.C.*, 492 U.S. 115, 126 (1989). (Emphasis supplied.)

The Maine statute cannot pass the rigors of strict scrutiny when subjected to the "least restrictive means" test. Assuming *arguendo* a compelling governmental interest,[2] a sweeping ban on all solicitations, by any person, for the "tangible benefit" of law enforcement officers is hardly the "least restrictive means" of promoting the asserted governmental interest, i.e., protecting the public from "police coercion." Such a prohibition includes third parties who are not law enforcement personnel, such as

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[2] "The Supreme Court rejected the state of Illinois' assertions in *Peel v. Attorney Registration & Disciplinary Comm'n of Ill.*, 110 S. Ct. 2281, 2291 (1990), that, even though it was '[l]acking empirical evidence to support its claim,' the Illinois Supreme Court's inherent authority to 'supervise its own bar' required the Supreme Court to defer to the state court in determining whether specific statements were protected by the First Amendment. The Court noted that the fact that the state supreme court is exercising its power to review the actions of the state bar commission 'does not insulate it from our review for constitutional infirmity.' *Id.* at 2292 (citations omitted). Here, the state of Maine provides no empirical data whatsoever and simply asserts that the court must deferentially accept at face value the Legislature's finding that the appearance of coercion inhere in all solicitation benefitting law-enforcement personnel. *Peel* makes clear that this is not so." Recommended Decision of the Magistrate Judge, n.7; Appendix p. 73a.

nonaffiliated private citizens acting solely out of altruistic motivation, and trained, registered professionals retained to perform fundraising services on behalf of law enforcement organizations.

A statute is overbroad if within its reach it prohibits constitutionally protected conduct as well as constitutionally unprotected conduct. *Grayned v. City of Rockford*, 408 U.S. 104, 114 (1972). While the overbreadth must be substantial for a statute to be found facially invalid, as opposed to striking it down for being unconstitutional as applied, the statute at issue is substantially overbroad. *New York v. Ferber*, 458 U.S. 747, 768-69 (1982). Some, if not all, of the solicitations that may be conducted by or on behalf of law enforcement officers in Maine could be made without the element of coercion which the legislature identified as the legislative purpose in its adoption of the Act. As was well articulated by the District Court in *Auburn I*:

> A complete prohibition on police solicitation is not narrowly tailored to Maine's evident interest in banning some, but not all, such solicitation. *See, e.g., Riley*, 487 U.S. at 801 ("Broad prophylactic rules in the area of free expression are suspect. Precision of regulation must be the touchstone in an area so closely touching our most precious freedoms.") (quoting *NAACP v. Button*, 371 U.S. 415, 438 (1963) (citations omitted)).

756 F.Supp. at 618.

Because the challenged statute completely extinguishes the right of *any* person to solicit the general public for the benefit of any law enforcement officer, agency, or association, it necessarily sweeps within its

prohibition speech which is not inherently coercive, and therefore, the First Circuit erred in finding it was not overbroad. On this issue, the First Circuit felt that it was constrained by this Court's summary affirmance in *State v. Maine State Troopers Ass'n ("MSTA")*, 491 A.2d 538 (Me. 1985), appeal dismissed, 474 U.S. 802 (1985). The First Circuit wrote that pursuant to the principles announced in *Mandel v. Bradley*, 432 U.S. 173 (1977), the summary dismissal in *MSTA* precluded consideration of the overbreadth of 25 Me. Rev. Stat. Ann. § 3702-A, which was Petitioners' primary challenge. Petitioners believe that the Court of Appeals was not so constrained. The statute found constitutional in *MSTA* was later found unconstitutional in *Auburn I*. The legislature, moreover, had continued to erode the "important governmental interest" by continuing to enact exceptions to the previously existing statute. Finally, the question presented below turned on facts "substantially different" from those presented in *MSTA*. The reticence of the First Circuit, of course, does not preclude consideration by this Court of the overbreadth issue. *Massachusetts Board of Retirement v. Murgia*, 427 U.S. 307, 309 n.1 (1976).

If permitted to stand, the decision below will send a signal to legislatures that law enforcement officers, and perhaps others of the government's choosing, are subject to content-based regulations of their speech as long as the State can articulate a "legitimate governmental purpose," even absent compelling empirical evidence.

II. THE STATUTE IS UNCONSTITUTIONAL AS APPLIED

Filed with Plaintiffs' Complaint were affidavits of each of the Plaintiffs, including R.H. McKnight Company, Inc. by its President Robert H. McKnight, specifically detailing the exact method used to raise funds on behalf of his clients, including the Plaintiff law enforcement groups. Therefore the District Court and the Court of Appeals both had before them the very "scripts" and fulfillment materials that would be utilized during the actual solicitation itself (see, 8 F.3d at 902 n.24; Appendix p. 36a), including a contractual agreement that no record or disclosure would be made of those persons who declined to participate, thereby eliminating the supposed element of coercion. Since the solicitation would be conducted by a paid representative who was unrelated to any law enforcement group, and since Plaintiffs were contractually bound not to reveal the identities of persons who declined to participate in the campaign, and potential donors were advised of this fact, the element of potential coercion was completely eliminated and therefore the statute would be unconstitutional as applied to these Petitioners.

Additionally, the Plaintiff Charles Underwood, a restaurateur in Waterville, Maine, expressed in his affidavit his desire to receive solicitations and purchase advertisements in Petitioners' publications in order to express his support for local police organizations. Mr. Underwood's standing with regard to the challenged statute is somewhat different than the other Petitioners in that he asserts the right to receive solicitations from persons acting on

behalf of law enforcement associations. As this Court first stated in *Martin v. Struthers*, 319 U.S. 141 (1943): "The right of freedom of speech and press . . . embraces the right to distribute literature (citations omitted), and necessarily protects the right to receive it." *Id.* at 143. In *Virginia State Board of Pharmacy v. Virginia Citizens Consumer Council, Inc.*, 425 U.S. 748 (1976), this Court stated that it: "has referred to a First Amendment right to 'receive information and ideas,' and that freedom of speech 'necessarily protects the right to receive.' " *Id.* at 757 [quoting *Kleindienst v. Mandel*, 408 U.S. 753, 762-63 (1972)]. Therefore, the chilling effect of the statute on those who wish to receive law enforcement solicitations must also be considered.

III. THE STATUTE IMPOSES A PRIOR RESTRAINT ON PROTECTED SPEECH

The Maine statute bans solicitation of funds by any person, for the tangible benefit of law enforcement officers, agencies, and organizations. It also prohibits Petitioners from soliciting paid advertising from the general public to defray the cost of publishing their literature and to raise funds. Accordingly, the statute imposes a prior restraint of protected speech in two areas: on the ability to disseminate the program service message on behalf of the respective organizations; and, on the ability to sell advertising for the publication of magazines. Because of the preferred position of First Amendment guarantees and because prior restraints have the potential of preventing protected speech entirely, prior restraints traditionally have been viewed as particularly offensive to the

First Amendment. *Near v. Minnesota*, 283 U.S. 697 (1931). Beginning with *Near*, a principle has evolved that any system of prior restraint of expression comes to this Court bearing a heavy presumption against its constitutional validity. *Bantam Books, Inc. v. Sullivan*, 372 U.S. 58 (1963); *Freedman v. Maryland*, 380 U.S. 51 (1965); *New York Times Co. v. United States*, 403 U.S. 713 (1971).

The First Circuit decision below seems to reject Plaintiffs' contention that a statute in and of itself, which creates a content-based prohibition on certain types of speech, can represent a prior restraint. Petitioners believe this ruling is not in accord with *Near*, which would seem to indicate that a statute which criminalizes certain speech activity, may constitute a prior restraint on protected expression. In *Near*, the Minnesota defamation statute under scrutiny authorized the entry of injunctive relief to prevent future publications. As the District Court recognized, the Maine statute similarly constitutes a prior restraint on speech and is therefore violative of the First Amendment.

IV. THE STATUTE IS UNCONSTITUTIONALLY UNDERINCLUSIVE

The Maine statute is unconstitutionally underinclusive in that while placing an outright prohibition on truthful speech ostensibly to protect a governmental interest, "it leaves appreciable damage to that supposedly vital interest unprohibited." *Florida Star v. B.J.F.*, 491 U.S. 524, 541-42 (1989). Both before and since the *MSTA* decision in 1985, the Maine legislature has yielded numerous exceptions to the ban on law enforcement solicitation

contained in the statute, including: an amendment to permit the Department of the Attorney General to charge for the cost of consumer education materials; a special law to permit solicitations for a period of one year, later extended an additional six months, to raise funds for the construction of a memorial to slain police officers; an exception permitting the state warden service associations to sell guidebooks and an exception permitting non-law enforcement officers to sell advertising in publications of the Department of Inland Fisheries and Wildlife. While the foregoing exemptions were repealed or expired, there remains in effect an exception allowing law enforcement officers running for public office to solicit contributions (25 Me. Rev. Stat. Ann. § 3712). Further, as noted, the statute implicitly permits law enforcement officers to solicit on behalf of unrelated charities. Indeed, rather than eliminating the exceptions to the statute, the legislative amendments have really only served to rearrange them.

As this Court stated in *F.C.C. v. League of Women Voters of California*, 468 U.S. 364, 396 (1984) such "patent . . . underinclusiveness . . . undermines the likelihood of a genuine [governmental] interest." And because the statute is underinclusive, it "provides only ineffective or remote support for the government's purpose." *Id.* However, the First Circuit rejected the underinclusiveness argument, apparently primarily due to the fact that most of the exceptions were repealed with the passage (or repassage) of 25 Me. Rev. Stat. Ann. § 3702-A. Yet, as the Magistrate Judge wrote in his Recommended Decision to the District Court below: "the proverbial egg cannot be unscrambled." (Appendex p. 68a.) The exceptions created

by the legislature to the outright ban on law enforcement solicitation demonstrated the legislative necessity of yielding certain exceptions to the comprehensive prohibition, thereby demonstrating such a ban to be unnecessarily overbroad to achieve the asserted governmental purpose. The history of exceptions to the statute indicates the diluted importance of the governmental interest asserted and the statute is therefore unconstitutional.

V. THE STATUTE VIOLATES THE EQUAL PROTECTION GUARANTEE OF THE FOURTEENTH AMENDMENT

When the government permits one speaker to exercise a right to speak, another speaker cannot be denied similar rights without substantial justification for differentiating between speakers. *Police Department of Chicago v. Mosely*, 408 U.S. 92 (1972). This substantial governmental interest must in fact be "compelling" because a deprivation of fundamental First Amendment rights is subject to strict scrutiny under the Equal Protection clause of the Fourteenth Amendment. *Shapiro v. Thompson*, 394 U.S. 618, 634 (1969).

The statute singles out the treatment of law enforcement officers, agencies, and associations apart from any other category of speaker in this broad prohibition against soliciting funds. Because charitable solicitation plainly involves expressive conduct within the protection of the First Amendment, discriminations among solicitations must be narrowly tailored to achieve a substantial government interest. As this Court stated in *Mosely*:

> Chicago may not vindicate its interest in preventing disruption by the wholesale exclusion of picketing on all but one preferred subject. Given what Chicago tolerates from labor picketing, the excesses of some non-labor picketing may not be controlled by a broad ordinance prohibiting both peaceful and violent picketing. Such excesses can be controlled by "narrowly-drawn statutes" . . . focusing on the abuses and dealing evenhandedly with picketing regardless of subject matter.

408 U.S. at 101. There is no substantial or compelling interest for differentiating between law enforcement officers and other categories of civil servants, especially those who protect the public safety such as fire fighters and emergency personnel. The position that it is somehow more coercive to be solicited by or on behalf of law enforcement officers than other categories of professionals involved in public service is insupportable.

Because the statute is a content-based regulation of fully protected speech, the State must demonstrate that it is narrowly tailored to serve a compelling governmental interest to survive the rigors of strict scrutiny. The State has not met that heavy burden and accordingly, the statute should be found unconstitutional.

CONCLUSION

The Petition for a Writ of Certiorari should be granted.

Respectfully submitted,

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Kansas City, Missouri
February 1994

UNITED STATES COURT OF APPEALS
For the First Circuit

No. 92-1951

AUBURN POLICE UNION, ET AL.,

Plaintiffs, Appellants,

v.

MICHAEL E. CARPENTER,
ATTORNEY GENERAL OF THE STATE OF MAINE,

Defendant, Appellee.

No. 92-2028

AUBURN POLICE UNION, ET AL.,

Plaintiffs, Appellees,

v.

MICHAEL CARPENTER,
ATTORNEY GENERAL OF THE STATE OF MAINE,

Defendant, Appellant.

APPEALS FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF MAINE

[Hon. D. Brock Hornby, *U.S. District Judge*]

Before

Cyr, *Circuit Judge*,

Campbell, *Senior Circuit Judge*,

and Boudin, *Circuit Judge*.

Errol Copilevitz with whom *John P. Jennings, Jr., Copilevitz, Bryant, Gray & Jennings, P.C., Leland N. Chisholm* and *Kelly, Remmel & Zimmerman* were on brief for plaintiffs.

MacKenzie Canter, III, Leonard J. Henzke, Jr., Lehrfeld, Canter, Henzke & Diskin and *George Gills* on brief for Maine State Troopers Association, National Association of Police Officers, National Troopers Coalition and Texas State Troopers Association, Amici Curiae.

Stephen L. Wessler, Deputy Attorney General, with whom *Michael E. Carpenter,* Attorney General, and *Thomas D. Warren,* Deputy Attorney General, were on brief for defendant.

November 12, 1993

CAMPBELL, *Senior Circuit Judge.* The State of Maine has enacted a law (hereinafter "the Act") prohibiting a person from soliciting property from the general public that tangibly benefits any law enforcement officer, agency or association.[1] Violations of the Act are declared to contravene the Maine Unfair Trade Practices Act, and they

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[1] Entitled the "Solicitation by Law Enforcement Officers Act," the statute provides that:

> A person may not solicit property from the general public when the property or any part of that property in any way tangibly benefits, is intended to tangibly benefit or is represented to be for the tangible benefit

may be enjoined and penalized civilly. Me. Rev. Stat. Ann. tit. 5, § 209 (West 1992).

Plaintiffs comprise a coalition of police unions, individual law enforcement officers, a professional fundraiser and a private citizen.[2] They sued in the United States District Court for the District of Maine pursuant to 42 U.S.C. § 1983, seeking to enjoin the Act and to have it declared unconstitutional under the First and Fourteenth Amendments to the United States Constitution.

While declaring that the provision for injunctive enforcement was an unconstitutional prior restraint, the district court otherwise upheld the Act against plaintiffs' overbreadth and equal protection challenges. Both the State of Maine and plaintiffs appeal. We vacate the district court's determination that the injunctive relief provision amounts to an impermissible prior restraint, and affirm the district court's upholding of the constitutionality of the Act.

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of any law enforcement officer, law enforcement agency or law enforcement association.

Me. Rev. Stat. Ann. tit. 25, § 3702-A (1992).

[2] Plaintiffs include the Auburn Police Union, the Portland Police Benevolent Association, and the Lewiston Police Union – all of which come within the definition of a "law enforcement association" as defined in Me. Rev. Stat. Ann. tit. 25, § 3701(2); Leonard Dexter, Kevin MacDonald, and David B. Chamberlain – all of whom are officers of law enforcement associations; R.H. McKnight Co., Inc., a corporation in the business of fundraising and promotions on behalf of law enforcement officers. agencies, and associations through sale of advertising and publication of trade magazines, programs and handbooks; and Charles Underwood, a private citizen who wishes to advertise in police publications and to receive copies of those publications.

I.

As the Act was originally enacted in 1977, its sole exception was for solicitations by or on behalf of law enforcement officers campaigning for election to public office – an exception still in existence. Me. Rev. Stat. Ann. tit. 25, § 3703. In 1983, the Act was amended to allow game wardens to sell historical publications describing state parks.[3] Me. Rev. Stat. Ann. tit. 25, § 3702.

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[3] After the 1983 amendment, section 3702 provided the following:

> No person may solicit property from the general public when the property, or any part of it, in any way benefits, is intended to benefit or is represented to be for the benefit of any law enforcement officer, law enforcement agency or law enforcement association, except that any state warden service association may offer for sale, by persons other than wardens or members of the association, to members of the public guide books or handbooks containing historical reviews or descriptions of services, except that on the request of a nonmember the association may provide that person with the copies requested for sale by that person. No advertisements may be sold or included in these publications, except greetings or complimentary statements from members or former members which shall give the full name of the member or former member. A stated rate for this advertisement space shall be published and no funds in excess of that stated rate may be accepted by the association for space.
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> A record of receipts and sales for space and sales of the publication shall be kept and available to the public during normal working hours.
>
> All proceeds from these sales shall be expended for direct charitable services to members or their spouses, widows, children, widowers or parents and

In 1983, Maine's Attorney General brought an action under the Unfair Trade Practices Act, Me. Rev. Stat. Ann. tit. 5, 205-A to 214, against the Maine State Troopers Association ("M.S.T.A.") – a law enforcement association as defined in Me. Rev. Stat. Ann. tit. 25, § 3701(2) – to enjoin the M.S.T.A. from engaging in solicitations in violation of § 3702. The Attorney General alleged that the M.S.T.A. had sold and offered to sell advertisements to Maine businesses for insertion in its magazine, "The Maine State Trooper." The M.S.T.A. challenged the Act's constitutionality, and the case went to the Maine Supreme Judicial Court (the "Law Court"), which in 1985 upheld the Act as constitutional. *See State v. Maine State Troopers Ass'n* ("*MSTA*"), 491 A.2d 538 (Me.), *appeal dismissed*, 474 U.S. 802 (1985).

The Law Court found that Maine had a compelling interest in avoiding police coercion. It found irrelevant the subjective intent of the solicitor and the absence of any complaint of coercion: ". . . at least the appearance of coercion inheres in every solicitation on behalf of law enforcement," undermining "the integrity of the office." *Id.* at 542-43. The Law Court noted the Maine Legislature's finding that "[s]olicitation by a law enforcement agency is inherently coercive." *Id.* In the court's view, the State's interest "in protecting the reputation of its law

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may not be used for buildings or equipment, construction or maintenance or entertainment of members.

Any violation of this chapter shall constitute a violation of Title 5, chapter 10, the unfair trade practices laws.

Me. Rev. Stat. tit. 25, § 3702.

enforcement bodies is undeniably substantial. Indeed, we would be hard pressed to suggest a weightier interest." *Id.* Holding the statute not to be "fatally overbroad," the Law Court emphasized that "the integrity of the State's law enforcement agents is cast in doubt with every solicitation on their behalf." *Id.* Thus the court found the Act constitutional.

The Law Court, however, affirmed the lower court's decision that under the Equal Protection Clause of the Fourteenth Amendment, the State could not impose any greater restrictions on the solicitation activities of other law enforcement officers than were imposed upon state wardens. *Id.* at 544.[4] The Maine State Troopers Association appealed from the Law Court's decision to the Supreme Court of the United States, which summarily dismissed the appeal for want of a substantial federal question. *Maine State Troopers Ass'n v. Maine*, 474 U.S. 802 (1985).

In 1989, following the Supreme Court's summary dismissal of the appeal in *MSTA*, the Maine Legislature amended the Act so as to permit the Department of the Attorney General to charge for the cost of consumer education materials. Me. Rev. Stat. tit. 25, § 3706. The Legislature additionally amended the Act to permit solicitations for a period of one year, later extended an additional six months, to raise funds for the construction of a

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[4] The Law Court affirmed the lower court's judgment that the M.S.T.A. should be permitted to sell their publications to the general public, subject to the same restrictions imposed on associations of state wardens by Me. Rev. Stat. Ann. tit. 25, § 3702.

memorial to slain police officers. Priv. & Spec. Laws 1989, Ch. 47; Priv. & Spec. Laws 1990, Ch. 114.

In 1990, the same plaintiffs who brought the present suit challenged the constitutionality of the Act in the federal district court. *See Auburn Police Union v. Tierney* (*"Auburn I"*), 756 F. Supp. 610 (D. Me. 1991). The district court affirmed the magistrate judge, who ruled in a comprehensive opinion that the Supreme Court's summary dismissal of *MSTA* was not a binding precedent because the Legislature's enactment of the above exceptions had undermined *MSTA*'s premise that all solicitation by law enforcement officers and organizations is inherently coercive. *Id.* at 616.[5] The court held that the Act was unconstitutionally overbroad and invalid on its face because "[a] complete prohibition on police solicitation is not narrowly tailored to Maine's evident interest in banning some, but not all, such solicitation." *Id.* at 618. The court further concluded that the Act violated the Equal Protection Clause of the Fourteenth Amendment because the State could not demonstrate a substantial governmental interest in permitting police solicitation for a memorial to slain officers, while prohibiting police solicitation for other causes. *Id.* at 619. Finally, the district court determined that the Act constituted an impermissible prior restraint because it "silences by fiat an entire category of charitable solicitation." *Id.* at 618. The State of Maine did not appeal in that case.

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[5] The magistrate judge rejected arguments that *MSTA* and the case before him turned on "very different" facts and that post-*MSTA* developments undermined *MSTA*'s precedential value.

Instead, in 1991, the Maine Legislature repealed the exemptions, except for the exemption for solicitations by or on behalf of law enforcement officers running for public office.[6] The Legislature then reenacted the prohibition on solicitations with one material change – the Legislature added the word "tangibly" prior to the word "benefits" in the new § 3702-A so as to "clarif[y] that the ban on solicitations applies only when the solicitations provide a tangible benefit to law enforcement." Sen. Amend. B to L.D. 1682 (115th Legis. 1991).

In October 1991, the Department of the Attorney General proposed rules under the Unfair Trade Practices Act, Me. Rev. Stat. Ann. tit. 5, § 207, defining the word "tangibly" as used in § 3702-A.[7] Me. Dep't of Att'y Gen. 26-239 (1991). These rules provide that "a solicitation which is completely unrelated to law enforcement officers, although it increases good will toward law enforcement, does not confer a tangible benefit," whereas "[a] solicitation which funds a law enforcement program,

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[6] In addition to repealing the exception allowing the Department of the Attorney General to charge for the cost of consumer education materials, Me. Rev. Stat. Ann. tit. 25, § 3706, the Legislature repealed the exception permitting State Warden Service associations to sell guide books but not advertisements, Me. Rev. Stat. Ann. tit. 25, § 3702, and an exception permitting non-law enforcement officers to sell advertising in publications of the Department of Inland Fisheries and Wildlife, Me. Rev. Stat. Ann. tit. 25, § 3705. The Private and Special Laws permitting solicitations to raise funds for the construction of a memorial to slain police officers expired by their own terms. Priv. & Spec. Laws 1989, Ch. 47; Priv. & Spec. Laws 1990, Ch. 114.

[7] The Attorney General has rulemaking authority under the Unfair Trade Practices Act. Me. Rev. Stat. Ann. tit. 5, § 207-2.

which otherwise would have to be funded through law enforcement's own budgeting processes, does confer a tangible benefit." *Id.*[8]

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[8] The "Rules Concerning Unfair Trade Practices and Charitable Solicitations by Law Enforcement Officers" provide the following:

> 109.1 SOLICITATIONS THAT TANGIBLY BENEFIT LAW ENFORCEMENT
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> A solicitation tangibly benefits a law enforcement agency, officer, or association if the proceeds of that solicitation are used, represented to be used, or intended to be used to support a law enforcement program or purpose which a law enforcement agency or association otherwise would have to fund through its own budgeting mechanism. Examples of solicitations which tangibly benefit law enforcement are as follows: (1) A solicitation which raises money from community members to pay for the purchase of equipment for a local police department; (2) A solicitation to send an officer into school classrooms to conduct anti-drug abuse training (the money paying for the officer's salary and for education materials); and (3) The solicitation of funds for erection of a monument to memorialize slain officers, which was permitted by prior law, Priv. & Spec. Laws 1989, ch. 47.
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> 109.2 SOLICITATIONS THAT DO NOT TANGIBLY BENEFIT LAW ENFORCEMENT
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> A solicitation of money for purposes completely unrelated to law enforcement, such as for a charity unrelated to law enforcement. does not confer a tangible benefit on law enforcement even if the solicitation effort increases good will toward law enforcement. For example, if police officers engage in solicitations of money for earthquake victims in South America, and if no law enforcement agency, officer, or association receives, is intended to receive, or is represented to receive any of the proceeds of the

Plaintiffs brought the present suit on September 27, 1991, seeking a declaratory judgment that § 3702-A is both facially unconstitutional and unconstitutional as applied. Preliminary and permanent injunctions against enforcement of § 3702-A were requested. Several plaintiffs alleged that they wanted to solicit advertising from the business community and to place those advertisements in police magazines like the "Maine State Trooper," and that the Act prohibited this conduct. According to plaintiffs, § 3702-A violates the First and Fourteenth Amendments because it is unconstitutionally overbroad, serves as an impermissible prior restraint on their freedom of speech, and denies to them the equal protection of the laws.

The district court held that the provision for enforcement of the Act through injunctive relief created an impermissible prior restraint. Otherwise, it upheld the constitutionality of § 3702-A. *See Auburn Police Union v. Carpenter* ("Auburn II"), 798 F. Supp. 819 (D. Me. 1992). Plaintiffs appeal, arguing that the Act is unconstitutionally overinclusive and underinclusive. Maine argues in response that the United States Supreme Court's summary dismissal of the appeal in *MSTA* must be accorded binding precedential effect on the issues of overbreadth and underinclusiveness. Even if the Supreme Court's summary dismissal does not control, Maine argues that the Act must still be upheld because it is narrowly tailored to serve a compelling interest. Maine also appeals

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solicitation, then that solicitation program will *not* tangibly benefit law enforcement.

Me. Dep't of Att'y Gen. ch. 109.

from the district court's declaration that the injunctive relief provision constitutes an impermissible prior restraint.

II.

This appeal presents difficult questions. We must decide, first, what issues are foreclosed by the Supreme Court's dismissal for want of a federal question of the appeal in *MSTA*. And, if any of the First and Fourteenth Amendment issues raised by appellants are not foreclosed by *MSTA*, we must decide them.

In the enabling Act, the Maine Legislature said that the Act:

> clarifies and reaffirms that the primary and compelling purpose underlying the laws governing solicitation by law enforcement officers is to eliminate the coercion that is inherent in solicitations by and on behalf of law enforcement officers by prohibiting such solicitations. When a law enforcement officer solicits from a prospective donor, the donor may not feel totally free to reject the request in light of the officer's position. . . .

Priv. & Spec. Laws 1991, Ch. 510 § 5. We set forth in an appendix the full text of this section of the enabling Act.

In challenging the Act, appellants contend it goes far beyond what is constitutionally permissible and necessary to address whatever valid concerns exist about the coerciveness of police solicitations. Appellants insist that such dangers, if any, must be regulated more narrowly,

for example, by legislation prohibiting solicitation by officers in uniform, or requiring that solicitation be done only by persons who are not themselves police officers. The present total ban on solicitation by any "person" when the property or any part of it "in any way tangibly benefits, is intended to tangibly benefit or is represented to be for the tangible benefit of any law enforcement officer . . . agency or . . . association," is said to be unconstitutionally broad, foreclosing innocent actions and speech that could not possibly cause any of the evils the Maine Legislature fears. For example, the Act would bar placing an unattended collection box for a police charity in a public place, even though doing this could not, appellants say, exert a coercive influence. Appellants say that the Act does not adopt, as the First Amendment requires, the least restrictive means to address the evil of police coercion; that it is a prior restraint, not only because of the conferred injunctive powers but because of its overall scheme; and that it offends other constitutional principles.

These issues are not easy given the protection our Constitution affords speech and speech-related activities. Nonetheless, we conclude that the Maine Legislature's effort to deal with the dangers of police solicitation is within its constitutional authority. We hold that the Supreme Court's dismissal of the *MSTA* appeal is binding on the overbreadth issue, and that appellants' remaining constitutional claims are insufficient.

A. Standard of Review

This case was submitted below on a stipulated record and upon cross-motions for summary judgment. In such a case, we review the district court's determinations *de novo. Brewer v. Madigan*, 945 F.2d 449, 452 (1st Cir. 1991); *New England Legal Found. v. Massachusetts Port Auth.*, 883 F.2d 157, 167 (1st Cir. 1989).

The standard for reviewing appellants' First Amendment claims depends upon whether the Act's effects on speech are content-based. Content-based regulations are subject to strict judicial scrutiny; they are "presumptively invalid." *R.A.V. v. St. Paul*, 112 S. Ct. 2538, 2542 (1992); *Simon & Schuster, Inc. v. Members of New York State Crime Victims Bd.*, 112 S. Ct. 501, 508 (1991) ("the Government's ability to impose content-based burdens on speech raises the specter that the Government may effectively drive certain ideas or viewpoints from the marketplace. [citation omitted] The First Amendment presumptively places this sort of discrimination beyond the power of the Government.").

The district court regarded the Act's restrictions as content-based, being limited to solicitations of property that tangibly benefits law enforcement officers and groups, and not extending to other sorts of solicitations. *See Burson v. Freeman*, 112 S. Ct. 1846, 1850-51 (1992) (plurality opinion) (statute prohibiting solicitation of votes, but allowing other forms of solicitation within one hundred feet of poll is content-based); *cf. Heffron v. International Soc'y for Krishna Consciousness, Inc.*, 452 U.S. 640, 648-49 (1981) (rule that no person or organization, whether commercial or charitable, may solicit except

from a rented booth is content-neutral restriction as it "applies evenhandedly to all who wish to distribute and sell written materials or to solicit funds").

Maine denies that the Act is content-based, arguing that § 3702-A prohibits only the *act* of soliciting for something that tangibly benefits law enforcement. According to the State, the content of the solicitation – i.e., whether the message is that funds are needed for more equipment, to advocate strengthening the drug laws, or to promote capital punishment legislation – is not relevant to § 3702-A's ban on solicitation.

But while the Act may not regulate the details of a given solicitation, the fact remains that it applies to, and prohibits, only certain types of solicitation, necessitating an examination of the content of each solicitation in order to determine whether the Act's criteria are implicated. The Supreme Court has pointed to "the reality that solicitation is characteristically intertwined with informative and perhaps persuasive speech seeking support for particular causes or for particular views on economic, political, or social issues, and for the reality that without solicitation the flow of such information and advocacy would likely cease." *Shaumburg v. Citizens for Better Env't*, 444 U.S. 620, 632 (1979). Like the court below, we conclude that the Act falls on the side of content-based regulation. As such, it is subject to "exacting First Amendment scrutiny.[9] *Riley v. National Fed'n of the Blind, Inc.*, 487 U.S. 781, 788 (1988).

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[9] Perhaps it might be argued – although Maine has not done so – that the Act is content-neutral because it seeks to prevent only the harmful "secondary effects" of solicitation, i.e., the implied coercion inherent in solicitation on behalf of law

B. Overbreadth – Binding Precedential Effect of MSTA

We move to Maine's argument that the summary dismissal of the appeal in *MSTA* by the Supreme Court of the United States is entitled to binding precedential effect on the issues of overbreadth and underinclusiveness.[10]

The Supreme Court's summary disposition of an appeal to it is an adjudication on the merits that must be followed by lower courts, subject, of course, to any later developments that alter or erode its authority. *Hicks v. Miranda*, 422 U.S. 332, 343-45 (1975). We need, therefore,

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enforcement personnel, with the resulting loss of integrity. Restrictions based on the content of speech that seek to regulate only the "secondary effects" of the speech have, in certain situations, been deemed content-neutral because they "serve purposes unrelated to the content of the expression." *Ward v. Rock Against Racism*, 491 U.S. 781, 791 (1989); *see Renton v. Playtime Theatres, Inc.*, 475 U.S. 41, 47 (1986), *reh'g denied*, 475 U.S. 1132 (1986). But even if this argument had not been waived, it is doubtful that these cases, involving very dissimilar facts and regulatory schemes, would apply here. *Cf. R.A.V.*, 112 S. Ct. at 2549 (listeners' reactions to speech are not "secondary effects"). In any event, we need not enter into the thicket of the "secondary effects" doctrine, as we conclude, *infra*, that, to the extent not controlled by the Supreme Court's summary dismissal of the *MSTA* appeal, the Act survives the stringent scrutiny applicable to content-based regulation.

[10] We find no merit in plaintiffs' contention that *Auburn I*, 756 F. Supp. 610, is stare decisis. This court is not bound by a district court opinion that was never appealed to, or affirmed in, this court. *See* 1B Moore's Federal Practice 0.402[2], p.I-23 (1993) ("the doctrine of stare decisis makes a decision on a point of law in one case a binding precedent in future cases *in the same court, and such courts as owe obedience to the decision.*") (emphasis added).

to determine the "reach and content" of the Supreme Court's dismissal of the appeal in *MSTA* for want of a substantial federal question. *See id.* at 345 n.14.[11]

In *Mandel v. Bradley*, 432 U.S. 173 (1977), the Supreme Court said that, "[s]ummary affirmances and dismissals for want of a substantial federal question without doubt reject the specific challenges presented in the statement of jurisdiction and do leave undisturbed the judgment appealed from. They do prevent lower courts from coming to opposite conclusions on the precise issues presented and necessarily decided by those actions." *Id.* at 176; *see Illinois State Bd. of Elections v. Socialist Workers Party*, 440 U.S. 173, 183 (1979) ("Questions which 'merely lurk in the record,' are not resolved, and no resolution of them may be inferred.") (quoting *Webster v. Fall*, 266 U.S. 507, 511 (1925)). The Supreme Court's summary disposition will not control later lower court cases involving

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[11] Both courts and commentators have noted the difficulty of ascertaining the proper reach of a Supreme Court summary disposition. *See Hicks*, 422 U.S. at 345 n.14 ("[a]scertaining the reach and content of summary actions may itself present issues of real substance"); *Fusari v. Steinberg*, 419 U.S. 379, 391 (1975) (Burger, C.J., concurring) ("Another common response to summary affirmances . . . is confusion as to what they actually do mean."), *reh'g denied*, 470 U.S. 955 (1975); *Preston v. Seay*, 684 F.2d 172, 173 (1st Cir. 1982) ("It is of course often difficult to understand the proper reach of Supreme Court summary affirmances and dismissals for want of a substantial federal question"); Note, "The Precedential Effect of Summary Affirmances and Dismissals for Want of a Substantial Federal Question by the Supreme Court After *Hicks v. Miranda* and *Mandel v. Bradley*," 64 Va. L. Rev. 117, 130 (1978) (noting "the difficulty inherent in any attempt to interpret a disposition without an opinion").

significantly dissimilar facts. *See Mandel*, 432 U.S. at 177 (vacating lower court decision that summary affirmance was binding because facts in summary affirmance were "very different" from those before lower court). The Supreme Court further cautioned that summary dispositions "should not be understood as breaking new ground but as applying principles established by prior decisions to the particular facts involved." *Id.* at 176.

In ascertaining the "reach and content" of the Court's summary dismissal in *MSTA*, we may not rely solely upon the reasoning of the Maine Law Court. *Id.* ("Because a summary affirmance is an affirmance of the judgment only, the rationale of the affirmance may not be gleaned solely from the opinion below."); *accord Anderson v. Celebrezze*, 460 U.S. 780, 785 n.5 (1983); *Fusari*, 419 U.S. at 391-92 (Burger, C.J., concurring). Instead, we should examine the jurisdictional statement filed in the Supreme Court of the United States and any other relevant aid to construction in order to ascertain what issues were "presented and necessarily decided" by the Court's summary dismissal.[12]

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[12] Besides contesting whether the current case presents the same issues that were involved in *MSTA*, plaintiffs contend that the facts in the instant case and *MSTA* are very different; that *MSTA* deviated from established constitutional principles and broke new ground; and that doctrinal developments have undercut the precedential value of *MSTA*. Like the district court in *Auburn I*, we find these three contentions lack merit. 756 F. Supp. at 614. Unlike the court in *Auburn I*, however, we also conclude that *MSTA* is entitled to binding precedential value on the issue of substantial overbreadth.

Examining the *MSTA* jurisdictional statement, together with the accompanying papers filed with the Supreme Court and the opinions of the lower courts, we conclude that appellants in *MSTA* specifically presented the issue of facial overbreadth, including whether the Act was broader than justified by the underlying state interest, to the Supreme Court. We think the Court was obliged to have considered and to have rejected this issue as a predicate to its dismissing of the appeal for want of a substantial federal question. The issue of so-called underinclusiveness, however, does not so clearly appear in the papers, and later changes in the Act further erode the present bearing of *MSTA* on that topic. Therefore, the dismissal in *MSTA* is binding upon us as to overbreadth, but is not binding as to underinclusiveness, nor binding as to certain "as applied" issues the plaintiffs have raised. We turn first to overbreadth.

In the strict sense, overbreadth is a doctrine for facially invalidating a statute that is "so broad that it 'may inhibit the constitutionally protected speech of third parties.' " *N.Y. State Club Ass'n v. New York*, 487 U.S. 1, 11 (1988) (quoting *Members of City Council of Los Angeles v. Taxpayers for Vincent*, 466 U.S. 789, 798 (1984)); *Regan v. Time, Inc.*, 468 U.S. 641, 651 n.7 (1984). There must be "a realistic danger that the statute itself will significantly compromise recognized First Amendment protections of parties not before the Court." *Id.* (quoting *Taxpayers for Vincent*, 466 U.S. at 801). The overbreadth "must not only be real, but substantial as well, judged in relation to the statute's plainly legitimate sweep." *New York v. Ferber*, 458 U.S. 747, 770 (1982).

Plaintiffs argue that the Act is overbroad in this classic sense. For example, without themselves necessarily wishing to engage in such conduct, they note that solicitors may wish to put out unattended collection boxes to receive police donations. This, they say, would be noncoercive, since no one would know who donated or did not donate, yet the Act would prohibit it. Similarly, plaintiffs point out that hypothetical private citizens, unconnected with the police, are prevented by the Act from soliciting donations to law enforcement from friends – for instance, from voluntarily soliciting funds to buy a new cruiser for a local department. This, too, is said to be an example of how the Act sweeps too broadly, prohibiting protected conduct by third parties.[13]

Classic overbreadth, however, was an argument specifically presented to the Supreme Court in the *MSTA* appeal and necessarily rejected by its dismissal of that appeal for want of a substantial federal question.

When so dismissing, the Supreme Court had before it, both in M.S.T.A.'s jurisdictional statement and in its

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[13] One can also hypothesize, for purposes of overbreadth analysis, other arguably unconstitutional applications of the Act. For example, the Act might be construed to prevent private citizens from asking for money to lobby for a bill that raises police salaries. However, because the Act's prohibition runs only against fundraising for the "tangible" benefit of law enforcement, the Maine courts might well reject any such interpretation. Speculative readings like this would seem best decided, if ever sought to be enforced, in an "as-applied" lawsuit, rather than hypothesized in advance for purposes of facial overbreadth analysis. In any case, as discussed *infra*, we consider the issue of facial overbreadth to be foreclosed by the Supreme Court's summary dismissal of the *MSTA* appeal.

notice of appeal, appellants' explicit contention that the Act was overbroad. And, as noted *supra*, the Law Court's underlying opinion from which appeal was being taken had specifically discussed and rejected overbreadth as a ground for invalidating the Act.

It is true that in first describing the questions presented on appeal, M.S.T.A.'s jurisdictional statement – after setting out the terms of the Act – defined the question only as whether or not the Act "violates the First and Fourteenth Amendments to the United States Constitution." Later, however, under the heading of "Stated Reasons for Plenary Consideration," the jurisdictional statement urged upon the Court the desirability of its being able to question counsel as to "the overbreadth doctrine." In a footnote appended to that suggestion, M.S.T.A. stated,

> "From the outset, appellant has asserted the overbreadth doctrine of *NAACP v. Button*, 371 U.S. 415 (1963)."

In *NAACP*, the Court had stated, among other comments relevant to overbreadth, "Furthermore, the instant decree may be invalid if it prohibits privileged exercises of First Amendment rights whether or not the record disclosed that the petitioner has engaged in privileged conduct." *Id.* at 432.

That overbreadth was specifically presented to, and rejected by, the Supreme Court is underscored by M.S.T.A.'s statement in its notice of appeal to the Supreme Court that appeal was taken from the portion of the Law Court's decision that "the statute in question is not overbroad." We find, therefore, that in denying the

MSTA appeal, the Supreme Court was expressly presented with, and must therefore have rejected, the argument that the Act was unconstitutional under the First Amendment because of overbreadth.

We think the Court's rejection of overbreadth subsumed, besides the "classic" overbreadth described above, another common variety of facial overbreadth claim. The term "overbreadth" is used in First Amendment contexts not only to invalidate statutes that are so broad as to inhibit the constitutionally protected speech of third parties, *supra*, but to facially invalidate statutes that inhibit free speech and are unsupported by a sufficiently compelling state interest or are not tailored narrowly to such an interest. *See Secretary of Maryland v. Joseph H. Munson Co.*, 467 U.S. 947, 965-66 n.13 (1984) ("where the defect in the statute is that the means chosen to accomplish the state's objectives are too imprecise, so that in all its applications the statute creates an unnecessary risk of chilling free speech, the statute is properly subject to facial attack."); *see also N.Y. State Club Ass'n*, 487 U.S. at 11; *Schaumberg*, 444 U.S. at 639, *Taxpayers for Vincent*, 466 U.S. at 797.

Any present claim of facial invalidity based on a purported absence of compelling state interest in prohibiting public solicitation for the tangible benefit of law enforcement officers and agencies seems to us to be precluded by the Supreme Court's dismissal of M.S.T.A.'s appeal.[14] Similarly, a facial invalidity claim based on an

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[14] As later sections of this opinion demonstrate, we do not regard the Court's denial of appeal in *MSTA* as barring our

alleged lack of narrow tailoring is likewise precluded. We so conclude not alone from the Law Court's own ruling in *MSTA*, which expressly found both a compelling state interest and the requisite narrow tailoring, but from express language in the jurisdictional statement submitted by M.S.T.A. when appealing to the Supreme Court from the Law Court's ruling. In that statement, as already noted, the terms of the challenged Act were set forth and an appeal on First and Fourteenth Amendment grounds noted. M.S.T.A. then went on to complain that the Law Court had held that the Act "in fact interferes with First Amendment freedoms, but that compelling state interests exist which permit the interference." M.S.T.A. characterized the Law Court's version of the compelling interest as "the interest of the State in the image of its law enforcement officers" and as "an intangible harm" allowed in the Law Court to "deprive law enforcement associations, and others, of protected First Amendment rights." M.S.T.A. urged summary reversal because the "Law Court, absent any evidence of actual or perceived coercion, apparently assumed the compelling state interest into existence based upon comments in the legislative history of the Act." M.S.T.A. urged the Supreme Court – if unwilling to reverse the Law Court summarily – to question counsel as to "the broad sweep of the State's alleged compelling interest, together with the appellant's

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consideration of claims attacking the sufficiency of the State's compelling interest based on underinclusiveness (equal protection) grounds.

assertion of the 'overbreadth doctrine.' " These statements were prefaced by mention of the trial court's finding that appellants had not engaged "in any form of coercion or otherwise used their official position to solicit advertising," a comment supportive of other remarks that the Law Court had rested the State's compelling interest solely on a need to conserve the "image" of its law enforcement officers.

We think the above statements necessarily alerted the Supreme Court to a claim of "overbreadth" based on the notion that the Act's burdens on speech went beyond any truly compelling state interest.

The challenged language of the present Act is virtually identical in all material respects to the statute found to be constitutional in *MSTA*. The key difference between the current version of the Act, Me. Rev. Stat. Ann. tit. 25, § 3702-A, and the prior version of the Act, Me. Rev. Stat. Ann. tit. 25, § 3702, is that the current version now provides that the prohibition on solicitation applies only when solicitation "tangibly" benefits any law enforcement officer, agency or association. This clarifies that police solicitation for charitable causes unrelated to law enforcement is not barred. Arguably, under the old statute such solicitation was barred because it intangibly benefited law enforcement by providing good will. Even assuming, however, that the addition of the word "tangible" to modify "benefits" in the present version worked a substantive change in the law, that change only narrowed the breadth of the Act's prohibition. Because § 3702-A is even narrower than the former § 3702, the Supreme Court's summary dismissal of *MSTA*, in which the Supreme Court necessarily rejected the overbreadth

and compelling interest challenges described above, is binding precedent on whether § 3702-A is overbroad in the senses just discussed. *See Glen Theatre, Inc. v. Pearson*, 802 F.2d 287, 290 (7th Cir. 1986) (if issue of overbreadth is raised in jurisdictional statement, Supreme Court's summary affirmance binds lower courts on that issue).

C. Underinclusiveness

While the *MSTA* appeal foreclosed present overbreadth claims, appellants raise other claims which in our view, the appeal has not foreclosed. We turn to these.

Facial First Amendment challenge is allowed to statutes burdening speech that are so grossly *under*inclusive as to cast doubt on the compelling nature of the state's asserted interest. *See R.A.V.*, 112 S. Ct. at 2547 (facially invalidating ordinance that applied only to "fighting words" that provoke violence "on the basis of race, color, creed, religion or gender."); *Florida Star v. B.J.F.*, 491 U.S. 524, 541-42 (1989) (Scalia, J., concurring) ("a law cannot be regarded as protecting an interest 'of the highest order,' and thus justifying a restriction on truthful speech, when it leaves appreciable damage to that supposedly vital interest unprohibited."); *FCC v. League of Women Voters*, 468 U.S. 364, 396 (1984) ("patent . . . underinclusiveness . . . undermines the likelihood of a genuine [governmental] interest.).[15]

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[15] A statute's underinclusiveness also indicates that the government is not, in fact, serving the proffered compelling interest. *Florida Star*, 491 U.S. at 540 ("facial underinclusiveness of [statute] raises serious doubts about whether Florida is, in

As already discussed, the jurisdictional statement in *MSTA* required the Supreme Court to consider whether the Maine Act was supported by a compelling state interest. Plaintiffs in the present case, however, assert that even if the version of the Maine Act upheld by the Maine Law Court in *MSTA* was supported by a compelling state interest, the Supreme Court's summary dismissal of *MSTA* is no longer binding precedent because the Maine Legislature has enacted and has later repealed or let expire, various exceptions to the Act's prohibition on solicitation that benefits law enforcement. According to plaintiffs, the Legislature's former enactment of these now-defunct exceptions permanently undermined the Act's compelling interest.[16] We disagree. We know of no precedent for invalidating a statute based on repealed exceptions: the Maine legislature, having restored the statute something close to its original form, is entitled to the same respect afforded to its original judgment.

While we reject plaintiffs' assertion that repealed exceptions to the Act prevent Maine from ever again having a compelling interest in prohibiting solicitation beneficial to law enforcement, we take more seriously plaintiffs' further contention that *extant* exceptions to the Act undermine the State's assertion of a compelling state

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fact, serving, with this statute, the significant interests which [the State] invokes"); *Women Voters*, 468 U.S. at 396 (because statute is underinclusive, it "provides only ineffective or remote support for the government's purpose"); *Carey v. Brown*, 447 U.S. 455, 465 (1980) ("nothing in the content-based labor-non-labor distinction has any bearing whatsoever on privacy").

[16] As the magistrate judge wrote in his Recommended Decision: "the proverbial egg cannot be unscrambled."

interest. Plaintiffs identify three such exceptions, said to make the Act unconstitutionally underinclusive: (1) The Act permits solicitations that intangibly benefit the police, e.g., solicitations by police officers for a public charity; (2) the Act permits solicitations that benefit state officials other than law enforcement officers; and (3) The Act permits solicitations on behalf of law enforcement officers campaigning for public office. While the latter distinctions were present in the statute upheld in *MSTA*, the issue of the Act's alleged underinclusiveness and its effect on the compelling state interest supporting the Act were not raised in either the Maine courts or in the jurisdictional statement to the Supreme Court.[17] Because the issue of the Act's purported underinclusiveness was not presented to the Supreme Court in *MSTA*, the Supreme Court's summary dismissal of that case is not binding precedent on this issue. *See Illinois State Bd. of Elections*, 440 U.S. at 183 ("Questions which merely lurk in the record are not resolved, and no resolution of them may be inferred.") (internal quotation omitted).

The State contends that the Act's purported underinclusiveness does not render it unconstitutional. The State relies, as did the district court, on the Hatch Act cases, *see, e.g., United States Civil Serv. Comm'n v. National Ass'n of Letter Carriers*, 413 U.S. 548, 556 (1973); *United Pub. Workers v. Mitchell*, 330 U.S. 75, 100 (1947), for the

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[17] While the Maine Law court in *MSTA* did consider the repealed Act's exception for game wardens, finding no justification for differentiating in treatment between M.S.T.A. and the game wardens, the statutory exceptions challenged by plaintiffs here either were not yet enacted when the Supreme Court summarily dismissed *MSTA*, or were not challenged in that case.

proposition that a legislature need not address an entire social problem at one time. In the Hatch Act cases, the Supreme Court upheld restrictions on partisan political activity by civil servants even though other types of political activity were not similarly restricted. But, while helpful to some degree, the Hatch Act cases are not on all fours. The Hatch Act cases rest upon the notion that the government has special rights to restrict partisan political speech of its employees and on its property. *Women Voters*, 468 U.S. at 401 n.27; *see International Soc. for Krishna Consciousness, Inc. v. Lee*, 112 S. Ct. 2701, 2705 ("Where the government is acting as a proprietor, managing its internal operations, rather than acting as a lawmaker with power to regulate or license, its action will not be subjected to the heightened review to which its actions as a lawmaker may be subject."). The Hatch Act cases are inapplicable to the question of whether a statute is unconstitutionally underinclusive when that statute, like the Main Act at issue here, restricts the speech of the general citizenry as well as that of public employees.

When a content-based regulation restricts both the speech of public employees and the general citizenry, it "simply cannot be defended on the ground that partial prohibitions may effect partial relief." *Florida Star*, 491 U.S. at 540. The Supreme Court explained why a statute's content-based underinclusiveness is objectionable when First Amendment rights are at stake, in *Erznoznik v. Jacksonville*, 422 U.S. 205 (1975):

> This Court frequently has upheld underinclusive classifications on the sound theory that a legislature may deal with one part of a problem without addressing all of it. *See, e.g.*,

> *Williamson v. Lee Optical Co.*, 348 U.S. 483, 488-489 (1955). This presumption of statutory validity, however, has less force when a classification turns on the subject matter of expression. "[A]bove all else, the First Amendment means that government has no power to restrict expression because of its message, its ideas, its subject matter, or its content." *Police Dept. of Chicago v. Mosley*, 408 U.S., at 95. Thus, "under the Equal Protection Clause, not to mention the First Amendment itself," *id.*, at 96, even a traffic regulation cannot discriminate on the basis of content unless there are clear reasons for the distinctions.

Id. at 215.

In order to avoid the conclusion under either the Equal Protection Clause or the First Amendment[18] that

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[18] When reviewing content-based distinctions, the Supreme Court has not differentiated the Equal Protection Clause from the First Amendment. *R.A.V.*, 112 S. Ct. at 2544 n.4 ("This Court . . . has occasionally fused the First Amendment into the Equal Protection Clause"); *Burson*, 112 S. Ct. at 1850-52 n.3 ("Under either a free-speech or equal-protection theory, a content-based regulation of political speech in a public forum is valid only if it can survive strict scrutiny."); *Erznoznik*, 422 U.S. at 215 (holding that under either the First Amendment or the Equal Protection Clause, there must be "clear reasons" for content-based distinctions); *Mosley*, 408 U.S. 92, 95 (1972) ("Of course, the equal protection claim in this case is closely intertwined with First Amendment interests."); *Harwin v. Goleta Water Dist.*, 953 F.2d 488, 490 n.3 (9th Cir. 1991) ("Under either [equal protection or first amendment] analysis, . . . independent justification of the discrimination is required."); *News America Pub. v. FCC*, 844 F.2d 800, 804 (D.C. Cir. 1988) (claim of underinclusiveness "lies at the intersection of the First Amendment's

the Maine Act is unconstitutionally underinclusive, the State must be able to point to clear reasons for the distinctions drawn by the Act. *See Austin v. Michigan State Chamber of Commerce*, 494 U.S. 652, 666 (1990) (the press's "unique societal role" provides a "compelling reason for the state to exempt media corporations from the scope of political expenditure limitations"); *Mosley*, 408 U.S. at 100 (ordinance prohibiting all peaceful picketing other than labor picketing is unconstitutional absent showing that the former is "clearly more disruptive"); *see also Cincinnati v. Discovery Network*, Inc., 113 S. Ct. 1505, 1524 (1993) (Rehnquist, C.J., dissenting) (in noncommercial speech cases, the Court has refused to accept distinctions between restricted and nonrestricted speech when those distinctions bear "no relationship to the interests asserted for regulating the speech in the first place"); *Fantasy Book Shop, Inc. v. City of Boston*, 652 F.2d 1115, 1121 n.6 (1st Cir. 1981) (rejecting challenge of facial underinclusiveness because "legislature could reasonably conclude that noncommercial amusements present sufficiently less likelihood of the harms sought to be prevented to justify their differential treatment"). The State's justifications for the Act's differential treatment must be "carefully scrutinized." *Carey*, 447 U.S. at 461-62. Although the case at hand is close, we believe the State has articulated satisfactory explanations for the Act's differential treatment.

To justify the "exception" in § 3702-A permitting solicitations that only intangibly benefit the police, the

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protection of free speech and the Equal Protection Clause's requirement that government afford similar treatment to similarly situated persons").

State relies principally upon the following statement of legislative intent included in the 1991 amendments to the Act:

> The Legislature . . . finds that solicitations [by police] for charitable purposes unrelated to law enforcement activities are not inherently coercive because the person solicited will know that law enforcement agencies or officers do not gain any tangible benefit and, consequently, will not be concerned with who donates.

Priv. & Spec. Laws 1991, Ch. 510, § 5. We find this to be a supportable basis for the distinction. It is true that the State has provided no purported empirical evidence to back up that finding.[19] The district court, in upholding

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[19] Plaintiffs contend that by simply asserting without empirical evidence that solicitations tangibly benefiting police are inherently coercive, the State has:

> taken the *effect* of the statute and posited that effect as the State's interest. If accepted, this sort of circular defense can sidestep judicial review of almost any statute, because it makes all statutes look narrowly tailored. . . . "Every content-based discrimination could be upheld by simply observing that the State is anxious to regulate the designated speech."

Simon & Schuster, 112 S. Ct. at 510 (quoting *Simon & Schuster, Inc. v. Fischetti*, 916 F.2d 777, 785 (2d Cir. 1990) (Newman, J., dissenting)).

Plaintiffs' reliance on *Simon & Schuster* is misplaced. In that case, New York argued that its Son-of-Sam law was supported by a compelling interest because it "ensur[ed] that criminals do not profit from story-telling about their crimes before their victims have a meaningful opportunity to be compensated for their injuries." The Court rejected New York's argument that this narrow interest was compelling because the State could not explain why it "should have any greater interest in

the constitutionality of the Act, stated that it would overlook the lack of empirical evidence and defer to the "legislative premise that these types of fundraising are different," since whether there is as much coercion in solicitations for charitable causes as for law enforcement purposes is a matter "on which reasonable minds may differ."

We agree that the lack of empirical evidence is not fatal. *See Burson*, 112 S. Ct. at 1856 (noting the difficulty of "isolat[ing] the exact effect of [laws restricting certain speech at polling places] on voter intimidation and election fraud" and suggesting that "[s]uccessful voter intimidation and election fraud is successful precisely because it is difficult to detect"); *Frisby v. Schultz*, 487 U.S. 434, 486 (1988) (noting that targeted residential picketing is "inherently" intrusive of residential property). While the Supreme Court has occasionally cited the lack of empirical evidence as a further ground for striking down a restriction on speech, *see, e.g., Peel v. Attorney Registration & Disciplinary Comm'n*, 496 U.S. 91, 106 (1990) (plurality) ("Given the complete absence of any evidence of deception," Court rejects state's contention that attorney's advertising was actually misleading), the Court has never laid down a categorical rule requiring that empirical evidence be shown to support every statutory restriction on

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compensating victims from the proceeds of such 'storytelling' than from any of the criminal's other assets." *Id.* By contrast, the State of Maine can and does explain why solicitations by police personnel for charitable purposes unrelated to law enforcement are not as inherently coercive as solicitations that tangibly benefit law enforcement officers, agencies or associations.

speech.[20] A categorical requirement would be unwise, we think, given the difficulty of securing definitive empirical evidence for unquantifiable issues of this sort.

The Maine Legislature's conclusion seems intuitively reasonable that solicitations – even when made by law enforcement personnel – for charitable purposes unrelated to law enforcement are not as inherently coercive as solicitations that tangibly benefit law enforcement officers, agencies or associations. Persons approached to contribute funds for the tangible benefit of law enforcement personnel, agencies or associations might well believe that the officers would be more deeply offended by a refusal than by rejection of officers' requests for a donation to a charity entirely unrelated to law enforcement. The Legislature "could reasonably conclude that [charitable solicitations] present sufficiently less likelihood of the harms sought to be prevented to justify their differential treatment." *See Fantasy Book Shop, Inc.*, 652 F.2d at 1121 n.6.

Plaintiffs' contention with respect to the Act's distinction between law enforcement officials and other types of public servants fares no better. The police occupy a unique role. They are empowered to enforce a wide array of criminal laws and to protect the property and lives of the general citizenry. To do this they are armed, given enhanced arrest powers, and given access to information networks and other tools denied to most citizens.

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[20] The Court has, however, required "substantial support in the record or findings" when "rights of political expression and association" are concerned. *E.g., In re Primus*, 436 U.S. 412, 434 n.8 (1978).

Police necessarily have considerable on-the-spot authority of a discretionary sort – whether to give or withhold a traffic ticket, to make an arrest, or to notice or disregard a violation. While evenhanded treatment is the ideal, officers may, and sometimes do, enforce laws in a less than neutral manner. For this reason, citizens and local businesses will try to stay on the good side of police, fearing – whether or not correctly – that a miffed police officer and his associates will retaliate, or will turn their backs when most needed. Hence, the Maine Legislature could reasonably conclude that police solicitation has a special potential for coercion not present in solicitation by other officials.

Plaintiffs' third example of the Act's purported underinclusiveness – the exception for solicitations on behalf of law enforcement officers running for public office – is also unavailing. As the district court properly recognized, law enforcement officers who run for electoral office, primarily county sheriffs, themselves have separate First Amendment interests. *See Burson*, 112 S. Ct. at 1850 (" 'the First Amendment 'has its fullest and most urgent application' to speech uttered during a campaign for political office' ") (quoting *Eu v. San Francisco Democratic Comm.*, 489 U.S. 214, 223 (1989) (quoting *Monitor Patriot Co. v. Roy*, 401 U.S. 265, 272 (1971))). A rule prohibiting "campaign fundraising by law enforcement personnel would effectively disqualify them from an office such as sheriff for, unless they were independently wealthy, they could easily be outspent by opponents who were not in law enforcement." *Auburn II*, 798 F. Supp. at 827. We, therefore, agree with the district court that the First Amendment right of law enforcement officers to engage

in campaign speech provides a substantial justification for the Act's exemption of such speech from its prohibition on solicitation.[21] *See Austin*, 494 U.S. at 668 (media exemption from prohibition on corporations using general treasury funds to support state candidate elections "ensures that the Act does not hinder or prevent the institutional press from reporting on, and publishing editorials about, newsworthy events").

As the State can furnish "clear reasons" for the asserted exemptions from the Act's prohibitions, and the reasons are not only clear but rational, we hold that the Maine Act is not unconstitutionally underinclusive.

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[21] To the extent that coercion is caused by police solicitations for campaign fundraising, the State has attempted to minimize it by imposing certain restrictions on such solicitations. For example, Me. Rev. Stat. Ann. tit. 25, § 3711 prohibits solicitations by law enforcement officers while in uniform. Section 3712 prohibits any law enforcement officer running for a nonpartisan public office from soliciting on his own behalf. Me. Rev. Stat. Ann. tit. 25, § 3712. Section 3713 prohibits the use of coercion in solicitations. Me. Rev. Stat. Ann. tit. 25, § 3713. Section 3714 makes a violation of these restrictions a Class E crime. Me. Rev. Stat. Ann. tit. 25, § 3714. Other restrictions on law enforcement officers running for elective office are contained in statute, union contracts and departmental regulations. *See* Me. Rev. Stat. Ann. tit. 30-A, § 355 (Pamph. 1991) (regulating political activity of sheriffs and deputy sheriffs). Together, these restrictions serve as an effective accommodation of the First Amendment right of the police to engage in political speech with the State's interest in preventing coercion inherent in police solicitation.

D. As Applied Challenge

Plaintiffs argue that the Act is unconstitutional as applied to the activities of plaintiff R.H. McKnight Co., a professional fundraiser and publisher of law enforcement magazines; plaintiff Charles Underwood, a private citizen who wishes to advertise in such magazines;[22] and the plaintiff law enforcement association which wishes to disseminate the magazines.[23] Plaintiffs contend that the sale of advertising in law enforcement publications like the "Maine State Trooper" is a noncoercive undertaking. Plaintiffs point specifically to the allegedly noncoercive nature of the system of solicitation designed by R.H. McKnight Co., in which telephone solicitors supposedly make it clear that they are not police officers, and the names of persons who do not purchase advertisements are not directly released to the sponsoring law enforcement organization.[24]

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[22] We note that plaintiff Underwood can raise no "as applied" challenge with regard to his right to advertise in the police magazines, as the statute does not prohibit him from advertising but from being *solicited* to advertise. As such, his claim is rightly considered along with those of plaintiff R.H. McKnight Co. and the plaintiff law enforcement association.

[23] It is debatable whether plaintiffs can bring an as-applied challenge in the context of a pre-enforcement declaratory judgment action. *See United States v. Gaudreau*, 860 F.2d 357, 360-61 (10th Cir. 1988) ("In a declaratory judgment action no one has been charged so the court cannot evaluate the statute as applied."). Rather than embark upon technicalities, however, we prefer to consider their arguments on the merits.

[24] A sample script utilized by R.H. McKnight telephone solicitors states the following:

Contrary to plaintiffs' view, we think the Maine Legislature could believe that solicitation of advertisements

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AUBURN CONSENT FORM/SALES PRESENTATION

> Hello, ___. This is ___ calling on behalf of the Auburn Police I.B.P.O. 414.
>
> I am working for the publishing company, and, as you may already know, we are going to be producing the Auburn Police I.B.P.O. # 414 Yearbook. This Yearbook will be of the highest quality with a full 8 1/2 x 11, four-color cover, and will contain pictures of the officers in action here in Auburn as well as articles of interest to the general public.
>
> We anticipate that our publication will be the best in the Auburn-Lewiston area. We will be producing 750 copies of our publication and giving them out free of charge to the public, libraries or business friends, as well as the officers of Auburn. Funds derived from the sale of advertising will go to scholarship fund (sic), as well as to improve law enforcement and the working conditions of the officers right here in Auburn.
>
> May I tell you the advertising prices?

In addition, each telephone solicitor must sign the following agreement before calling on behalf of a police organization:

CONSENT

> I ___ agree to adhere to the above sales presentation for the Auburn Police International Brotherhood of Police Officers Local # 414. *I will not* state or imply that I am an Auburn Police Officer – only that I am calling on behalf of: (sic) and that I work for the publishing company.

Affidavit of R.H. McKnight, Appendix 1.

to benefit law enforcement is inherently coercive because the persons solicited will experience pressure to purchase an advertisement so that their support of law enforcement will become known to police or so that their failure to buy an advertisement will not be noticed. The Legislature could reasonably doubt that the solicitations would become noncoercive merely because the names of those who do not purchase advertisements were promised not to be disclosed to the police. The advertisements will be public. Accordingly, law enforcement officers will be aware of who contributed and, by the absence of advertisements, of who did not contribute. Moreover, those solicited may not believe, even if they are assured, that their names will not be communicated. The Law Court in *MSTA* was of the view that, quite apart from actual

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Finally, although the names of those who do not purchase advertising are not directly disclosed to the police organization, a disclosure and thank you is mailed to each advertiser in the name of the police organization:

> Please make your check payable to the Auburn Police I.B.P.O. Local # 414 and send with your ad copy, letterhead, or business card to: P.O. Box 3291, Auburn, Maine 04212. The International Brotherhood of Police Officers Local # 414 is a non-profit organization, not a charitable organization. Therefore, your payment can be deducted as an advertising expense only. Thank you for your support. With Your help we are able to go forward. The telephone call you received was from a representative of the publishing company and not a member of the Police Department. Officers do not elect to solicit as it may unduly influence your decision. If you have any questions, please don't hesitate to ask.

coercion, the state's legitimate interest included maintaining the good public reputation of its police. We are not persuaded that plaintiffs' alternatives would necessarily answer that concern.

Because plaintiffs, proposed solicitations remain inherently coercive, or at least do not remove the appearance of coercion and favoritism, we reject plaintiffs' argument that the Act is unconstitutional as applied.

E. Prior Restraint

Any violation of the Act's prohibition on solicitation that tangibly benefits law enforcement is considered a violation of the Maine Unfair Trade Practices Act. Me. Rev. Stat. tit. 25, § 3702-A. The Act, therefore, can be enforced either through civil penalties or injunctive relief. Finding that enforcement of the Act through injunctive relief would constitute an impermissible prior restraint, the district court declared the injunctive relief provision of the Act to be unconstitutional.[25] While the district

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[25] Plaintiffs actually argued to the district court, and to this court, that the Act's categorical prohibition on solicitation, in and of itself, constitutes an unconstitutional prior restraint. According to plaintiffs, the Act constitutes a prior restraint because it "silences by fiat an entire category of charitable solicitation." *Auburn I*, 756 F. Supp. at 618. In this respect, argue plaintiffs, the Act is "a form of censorship; it prejudges rather than punishes after the fact." *Id.* Plaintiffs further contend that barring solicitation of funds is a particularly effective prior restraint because law enforcement agencies will not have the financial resources to spread their message to the general public.

The district court correctly rejected plaintiffs' arguments that the entire Act should be invalidated as a prior restraint.

court's concern that injunctions are rarely tolerated in the First Amendment context is understandable, we think the court acted improperly in invalidating the Act's injunctive relief provision on its face.

A prior restraint is a government regulation that limits or conditions in advance the exercise of protected First Amendment activity. *Fantasy Book Shop, Inc.*, 652 F.2d at 1120. Although the classic form of prior restraint involves an administrative licensing scheme, *see Jews for Jesus, Inc. v. Massachusetts Bay Transp. Auth.*, 984 F.2d 1319, 1326-27 (1st Cir. 1993), a judicial injunction that prohibits speech prior to a determination that the speech is unprotected also constitutes a prior restraint. *See Near v. Minnesota*, 283 U.S. 697 (1931). Any system of prior restraints of speech "comes to this Court bearing a heavy presumption against its constitutional validity." *Southeastern Promotions, Ltd. v. Conrad*, 420 U.S. 546, 558 (1975); *Bantam Books, Inc. v. Sullivan*, 372 U.S. 58, 70 (1963); *New York Times Co. v. United States*, 403 U.S. 713, 714 (1971); *Organization for a Better Austin v. Keefe*, 402 U.S. 415, 419 (1971).

Under plaintiffs' analysis, almost any regulation of speech would be considered a prior restraint since most restrictions on speech will have consequences on later speech. While the Supreme Court has cautioned that "[b]road prophylactic rules in the area of free expression are suspect," *Riley*, 487 U.S. at 801, the Court has never said that a categorical ban on speech is a per se prior restraint. Instead, the Court has, for the most part, carefully limited the prior restraint doctrine to administrative and judicial orders prohibiting speech before it is actually uttered.

The presumption against the constitutionality of prior restraints is heavier than that against restrictions on speech imposed by subsequent penalties. *Vance v. Universal Amusement Co.*, 445 U.S. 308, 315-16 (1980); *Southeastern Promotions Ltd.*, 420 U.S. at 558-59; *New York Times Co.*, 403 U.S. at 733 (White, J., concurring). The Supreme Court has explained the rationale behind this heavy presumption against prior restraints as follows:

> Behind the distinction is a theory deeply etched in our law: a free society prefers to punish the few who abuse rights of speech *after* they break the law than to throttle them and all others beforehand. It is always difficult to know in advance what an individual will say, and the line between legitimate and illegitimate speech is often so finely drawn that the risks of free-wheeling censorship are formidable.

Southeastern Promotions Ltd., 420 U.S. at 559.

The Supreme Court, however, "has never held that all injunctions are impermissible." *Pittsburgh Press Co. v. Pittsburgh Comm'n on Human Relations*, 413 U.S. 376, 390 (1973). "The special vice of a prior restraint is that communication will be suppressed, either directly or by inducing excessive caution in the speaker, before an adequate determination that it is unprotected by the First Amendment." *Id.* An injunction that is narrowly tailored, based upon a continuing course of repetitive speech, and granted only after a final adjudication on the merits that the speech is unprotected does not constitute an unlawful prior restraint. *See id.; Securities & Exchange Comm'n v. Wall St. Publ. Institute, Inc.*, 851 F.2d 365, 370 (D.C. Cir. 1988). The Maine courts may interpret the statute or

apply it so as to avoid the issuance of ex parte restraining orders or even temporary injunctions, using their equitable powers only following full hearings and final adjudications.

Because plaintiffs brought this action seeking pre-enforcement declaratory relief, there is, at present, no injunction restraining solicitation activities. Without having before us the concrete example of a particular injunction, it is difficult, if not impossible, for us to determine whether the prior restraint doctrine has or will be violated.[26] *See American Library Ass'n v. Barr*, 956 F.2d 1178, 1190 (D.C. Cir. 1992) ("Whether use forfeiture constituted a restraint on speech, prior or otherwise, would seem to depend on the nature of the property and the circumstances of the offender, about which we have no information in this case."). We choose to let stand the Act's provision authorizing enforcement through injunctive relief and leave for another day the determination

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[26] Injunctions, in this respect, are distinguishable from administrative licensing schemes that constitute prior restraints. "[W]hen a licensing statute vests unbridled discretion in a government official over whether to permit or deny expressive activity, one who is subject to the law may challenge it facially without the necessity of first applying for, and being denied, a license." *Lakewood v. Plain Dealer Pub. Co.*, 486 U.S. 750, 755-56 (1988); *see, e.g., FW/PBS, Inc. v. Dallas*, 493 U.S. 215 (1990); *Freedman v. Maryland*, 380 U.S. 51, 56 (1965). In such cases, it is the very existence of unbridled discretion that is constitutionally unacceptable because it "intimidates parties into censoring their own speech, even if the discretion and power are never actually abused." *Lakewood*, 486 U.S. at 756. By contrast, the statutory authority to issue an injunction does not create the same danger.

whether a specific injunction – should the State decide to proceed in such a fashion – constitutes an unlawful prior restraint.

III.

We hold that Maine's Solicitation by Law Enforcement Officers Act, Me. Rev. Stat. Ann. tit. 25, § 3702-A, does not violate the First or the Fourteenth Amendments of the United States Constitution. The district court's determination that Me. Rev. Stat. Ann. tit. 25, § 3702-A is not unconstitutionally overbroad or underinclusive is *affirmed*. The court's declaration that the Act's provision for enforcement through injunctive relief is unconstitutional is *reversed*.

Costs to the State of Maine.

APPENDIX

STATE OF MAINE

An Act to Amend the Laws Concerning Solicitation by Law Enforcement Officers

Be it enacted by the People of the State of Maine as follows:

. . . .

Sec. 5. Legislative intent. It is the intent of the Legislature to repeal all exceptions to the prohibition against solicitation by law enforcement agencies, officers and associations. The Legislature finds that the various exceptions to the prohibition enacted over the years, in fact, have led to inherently coercive solicitations and that

those exceptions ultimately undermine the integrity of law enforcement. As a consequence, the Legislature repeals these exceptions and reenacts the prohibition on solicitations by or on behalf of law enforcement. The Legislature further finds that solicitations for charitable purposes unrelated to law enforcement activities are not inherently coercive because the person solicited will know that law enforcement agencies or officers do not gain any tangible benefit and, consequently will not be concerned with who donates. This Act clarifies and reaffirms that the primary and compelling purpose underlying the laws governing solicitation by law enforcement officers is to eliminate the coercion that is inherent in solicitations by and on behalf of law enforcement officers by prohibiting such solicitations. When a law enforcement officer solicits from a prospective donor, the donor may not feel totally free to reject the request in light of the officer's position. This occurs regardless of the subjective intent of the officer to coerce the prospective donor. In addition to the effect on the prospective donor, the appearance of the transaction to 3rd persons may undermine public confidence in the integrity of the public office. At least the appearance of coercion inheres in every solicitation that tangibly benefits law enforcement agents and the appearance undermines the integrity of the office. The Legislature finds that the State has a compelling interest in preserving the integrity of law enforcement officers and finds that regulating all law enforcement solicitations that tangibly benefit law enforcement is necessary to promote this compelling state interest. [Priv. & Spec. Laws 1991, Ch. 510.]

UNITED STATES DISTRICT COURT

DISTRICT OF MAINE

AUBURN POLICE UNION, et al., Plaintiffs	)	CIVIL NO.: 91-292-P-H
v.	)	
MICHAEL E. CARPENTER, as Attorney General of the State of Maine,	)	
Defendant	)	

JUDGMENT

(Filed July 14, 1992)

In accordance with the Memorandum Decision by Hornby, J. dated July 13, 1992, declaratory judgment is hereby entered as follows: 25 M.R.S.A. § 3702-A is unconstitutional insofar as it is to be enforced by injunctive relief, but is constitutional shorn of the injunctive remedy.

WILLIAM S. BROWNELL
Clerk of Court

By: /s/ Christa K. Thurber
Christa K. Thurber
Deputy Clerk

Dated at Portland, Maine this 14th day of July, 1992.

A TRUE COPY
ATTEST William S. Brownell,
Clerk

By /s/ Christa K. Thurber
Deputy clerk

UNITED STATES DISTRICT COURT

DISTRICT OF MAINE

AUBURN POLICE UNION, et al., Plaintiffs	)	
v.	)	Civil No. 91-292-P-H
MICHAEL E. CARPENTER, as Attorney General of the State of Maine, Defendant	)	

MEMORANDUM OF DECISION

(Filed July 13, 1992)

This case addresses the constitutionality, under the First and Fourteenth Amendments, of a Maine statute prohibiting fundraising that tangibly benefits law enforcement activities.[1] The statute can be enforced by injunctive relief and civil penalties. I conclude that the

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[1] The statute provides:

> A person may not solicit property from the general public when the property or any part of that property in any way tangibly benefits, is intended to tangibly benefit or is represented to be for the tangible benefit of any law enforcement officer, law enforcement agency or law enforcement association. Any violation of this chapter constitutes a violation of the Maine Unfair Trade Practices Act.

25 M.R.S.A. § 3702-A. Although the statute prohibits solicitation of any kind of property, I will speak generally of fundraising. According to the parties' stipulation, the solicitation of paid advertising in law enforcement publications is a primary method of fundraising.

injunctive relief amounts to an unconstitutional prior restraint but that otherwise the statute is constitutional. Consequently, I accept in part and reject in part the decision of the United States Magistrate Judge.[2]

I. Procedural Background

In 1977, the Maine Legislature prohibited law enforcement personnel from general public fundraising. 25 M.R.S.A. § 3702. The law was amended in 1983 to exempt game wardens in limited circumstances. *Id.* In 1985, the Maine Supreme Judicial Court, sitting as the Law Court, upheld the constitutionality of the statute. *See State v. Maine State Troopers Ass'n*, 491 A.2d 538 (Me. 1985), *appeal dismissed*, 474 U.S. 802 (1985). The Law Court found that the State had a compelling interest in avoiding police coercion and that such coercion was inherent any time a law enforcement officer asked a business or other person for money. *Id* at 542-43. The Law Court also found that the statute was narrowly drawn to accomplish this compelling interest. *Id.* The Law Court did, however, invalidate the statutory exception for game wardens. *Id* at 544. The United States Supreme Court summarily dismissed the appeal. 474 U.S. 802.

In 1989, the Maine Legislature again amended the statute, this time exempting certain activities of the Attorney General, 25 M.R.S.A. § 3706 (repealed), and permitting public fundraising for a memorial to law enforcement personnel killed in the line of duty. P. & S. L.

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[2] The parties have stipulated to the facts and all that remain are legal questions. My review is therefore *de novo*.

1989 ch. 47. In a later lawsuit, this Court found the amended statute unconstitutional because, in creating the exceptions, the Legislature had demonstrated that it no longer viewed the avoidance of police coercion as a compelling interest. *Auburn Police Union v. Tierney*, 756 F. Supp. 610 (D. Me. 1991).

In light of that holding the Legislature repealed the exceptions and redrafted the statute to provide that fundraising from the general public is illegal if the money will "tangibly benefit" law enforcement. 25 M.R.S.A. § 3702-A. The legislative history makes clear, and regulations confirm, that the new language prohibits most police fundraising, but permits police personnel to raise money for charities unrelated to law enforcement.[3] In addition, the

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[3] The Department of the Attorney General's regulations describe the class of permitted solicitations as follows:

> A solicitation of money for purposes completely unrelated to law enforcement, such as for a charity unrelated to law enforcement, does not confer a tangible benefit on law enforcement even if the solicitation effort increases good will toward law enforcement. For example, if police officers engage in solicitations of money for earthquake victims in South America, and if no law enforcement agency, officer, or association receives, is intended to receive, or is represented to receive any of the proceeds of the solicitation, then that solicitation program will *not* tangibly benefit law enforcement.

Me. Dep't of Att'y Gen. ch. 109.2: Rules Concerning Unfair Trade Practices and Charitable Solicitations By Law Enforcement Officers.

statute preserves an exemption permitting law enforcement personnel to raise money for purposes of campaigning for public office. 25 M.R.S.A. § 3703.[4] The office of sheriff, for example, is an elected office under both the Maine Constitution and Maine statute. Me. Const. art IX, § 10; 30 M.R.S.A. § 901.

In this new declaratory judgment action, various organizations representing police interests, as well as individuals and organizations that raise money on behalf of police activities, have challenged the constitutionality of the statute under the United States Constitution. The underlying facts are stipulated.

II. First Amendment Challenges

A. Standard of Review

This case involves the solicitation of money. Both sides agree that commercial speech (as the United States Supreme Court has used that term) is not involved here. Instead, this solicitation of money is to be treated as a traditional speech activity that receives full First Amendment protection. *See International Society for Krishna Consciousness, Inc. v. Lee*, ___ U.S. ___, 60 U.S.L.W. 4749 (U.S. June 26, 1991) (solicitations by Society for Krishna Consciousness at airports); *Riley v. Nat'l Fed'n of the Blind of North Carolina, Inc.*, 487 U.S. 781 (1988) (solicitations by professional fundraisers for various causes and charitable organizations); *Secretary of State of Md. v. J.H. Munson Co. Inc.*, 467 U.S. 947 (1984) (professional fundraiser whose

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[4] Although this exception is not new, the earlier lawsuits did not address it.

customers included various chapters of the Fraternal Order of Police); *Village of Schaumburg v. Citizens for a Better Env't*, 444 U.S. 620 (1980) (solicitation on behalf of nonprofit environmental protection organization).

Although the State Attorney General's Office has resisted the conclusion, the restriction imposed on free speech here is clearly content-based. Law enforcement personnel may go door-to-door to homes and businesses and talk on a variety of subjects. They can even raise money for various kinds of charitable undertakings. But they run afoul of the law if their conversation turns to money for bulletproof vests or for the local police union. The conclusion is thus unavoidable that the content of the speech determines what is permitted and what is prohibited. Such content-based restrictions on speech amount to the censorship of ideas in its classic form and must therefore receive "exacting scrutiny" under the First Amendment. For the statute here to survive attack, it must further a compelling state interest and its measures must be narrowly drawn to accomplish that end. *Burson v. Freeman*, ___ U.S. ___, 60 U.S.L.W. 4393, 4395 (U.S. May 26, 1992).

B. Prior Restraint

This statute is enforced through the Maine Unfair Trade Practices Act. As a result, the Attorney General may seek both injunctive relief and civil penalties. 5 M.R.S.A. § 209.

Injunctive relief prohibiting speech before it is even uttered unquestionably amounts to a "prior" or "previous" restraint. *Organization for a Better Austin v. Keefe*,

402 U.S. 415 (1971); Melvile B. Nimmer, *Nimmer On Freedom of Speech* § 4.03 (1991). The United States Supreme Court has said over and over again that there is a very heavy presumption against the constitutional validity of prior restraints. *New York Times Co. v. United States*, 403 U.S. 713 (1971); *Bantam Books, Inc. v. Sullivan*, 372 U.S. 58, 70 (1963) ("[a]ny system of prior restraints or expression comes to this Court bearing a heavy presumption against its constitutional validity"), *citing Near v. Minnesota*, 283 U.S. 697 (1931). Indeed, the First Circuit has observed that in two centuries of our history the United States Supreme Court has *never* sustained a prior restraint on pure speech. *In re Providence Journal Co.*, 820 F.2d 1342, 1348 (1st Cir. 1986). The United States Supreme Court has not applied the prior restraint doctrine only to restraints on the press, but has also extended it to freedom of speech generally. *See, e.g., Saia v. New York*, 334 U.S. 558 (1948) (invalidating an ordinance that prohibited use of loudspeakers without the permission of the City's Chief of Police because "it establishe[d] a previous restraint on the right of the speech"); *Kunz v. New York*, 340 U.S. 290 (1951) (invalidating a New York City ordinance forbidding public worship meetings on the streets without a permit because the ordinance was a prior restraint).[5]

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[5] The Attorney General's Office suggested at oral argument that the prior restraint doctrine should be limited to cases involving a "publication." Although the doctrine apparently originally derived from concern over censorship that occurred under early licensing systems of printing presses and, therefore, could conceivably have been limited to First Amendment freedom of the press, the Supreme Court cases have recognized no such limitation.

To be sure, there are limited exceptions to the prior restraint doctrine. Reasonable time, manner and place restrictions for use of a public forum are permitted. *United States v. Kokinda*, 497 U.S. 720 (1990); *see generally* Nimmer at § 4.06[B]. A prior restraint against fraudulent commercial speech may be constitutionally permissible, *see Donaldson v. Read Magazine, Inc.*, 333 U.S. 178, 189-91 (1948); *Virginia State Bd. of Pharmacy v. Virginia Citizens Consumer Council, Inc.*, 425 U.S. 748, 771-72 n.24 (1976), as well as restraints against copyright infringement and antitrust violations. But these exceptions do not apply here. No permit is available for these solicitation activities under any circumstances. Since this case involves noncommercial speech, the fraudulent commercial speech exception is inapplicable. Moreover, none of the copyright or antitrust arguments apply.

Finally, given the cases in which the United States Supreme Court has prohibited prior restraints, such as the Pentagon Papers case where the *national security itself* was said to be at stake, *New York Times Co. v. United States*, 403 U.S. 713, there is no basis for enlarging these limited exceptions to the prior restraint doctrine and finding that the state interest here – avoiding the inherent coercion in police fundraising – justifies an injunction rather than the penalties that can be imposed if illegal

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It is true that commentators have criticized prior restraint doctrine, and suggested that it lacks coherence or has outlived its usefulness. *See, e.g.*, John Calvin Jeffries, Jr. *Rethinking Prior Restraint*, 92 Yale L.J. 409 (1983). If the doctrine is to be changed, however, it must be by the United States Supreme Court, not a trial court.

fundraising occurs.[6] Enforcement of the statute by injunctive relief is therefore unconstitutional.[7]

At oral argument the State Attorney General's Office stated that injunctive relief is the primary enforcement device for the statute and that if injunctive relief is eliminated the statute is essentially gutted. Since that was a statement made under the pressures of oral argument, it may not represent the State's considered position on the legislation. I will therefore proceed to address the constitutionality of the statute if it is enforced without injunctive relief.[8]

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[6] Without these precedents, the argument might be made that a prior restraint is necessary here because once the solicitation is successful, the damage is done, the "taint" on law enforcement has occurred, and no later civil penalty can undo it.

[7] The version of the statute upheld by the Law Court in *State v. Maine State Troopers Ass'n*, 491 A.2d 538 (Me. 1985), *appeal dismissed*, 474 U.S. 802 (1985), also provided for injunctive relief. But examination of the Superior Court's ruling in that case (declining to issue injunctive relief), as well as the Law Court's decision, and the briefs filed in the appeal to the United States Supreme Court, reveals that "prior restraint" was never argued. Consequently, these courts cannot be considered to have ruled on the issue.

[8] Without the injunctive relief provision, there is no prior restraint. Contrary to the plaintiffs' Complaint, the fact that imposing civil penalties on law enforcement fundraising may thereby affect later speech (i.e., without fundraising the law enforcement agencies will not have the resources to make their views known later) does not ipso facto make such civil penalties a prior restraint. Since any restraint on speech may have consequences for later speech, every regulation of speech would be a prior restraint under that analysis.

C. Constitutionality of the Statute Without Prior Restraint

By summarily dismissing the appeal from the Law Court's decision in *Maine State Troopers Ass'n*, the United States Supreme Court has recognized that avoiding the coercion inherent in police fundraising can be a compelling state interest if the State chooses to recognize it as such. *State v. Maine State Troopers Ass'n*, 491 A.2d at 542-43, *appeal dismissed*, 474 U.S. 802. I am bound by that decision. *Mandel v. Bradley*, 432 U.S. 173, 176 (1977). The *Maine State Troopers Ass'n* decision also recognized that the statute as then presented and argued to the Law Court and the United States Supreme Court was narrowly drawn to implement the compelling interest. *State v. Maine State Troopers Ass'n*, 491 A.2d at 543. The statute has undergone a number of changes since the Law Court and United States Supreme Court decisions, however, and I must accordingly analyze whether the statue as *currently* enacted reflects state recognition of a compelling interest and whether it is sufficiently narrowly drawn to satisfy First Amendment concerns.

In part, this analysis involves so-called First Amendment overbreadth issues. That is, even if the statute is constitutional as applied to these particular plaintiffs and their proposed activities, does it unconstitutionally prevent other speech? The United States Supreme Court has made clear that a statute should be struck down on this ground only if its overbreadth is "substantial." *Broadrick v. Oklahoma*, 413 U.S. 601, 615 (1973). In fact, a statute will be *sustained* against First Amendment attack where "despite some possibly impermissible application, the

'remainder of the statute . . . covers a whole range of easily identifiable and constitutionally proscribable . . . conduct.' " *Secretary of State of Md. v. J.H. Munson Co.*, 467 U.S. 947, 964-65 (citations omitted).

In this connection, the plaintiffs suggest that the statute prohibits an unattended collection box in a public place seeking money for causes that would tangibly benefit police officers. They argue that there is no coercion possible or likely in that circumstance and that the statute is therefore unconstitutionally overbroad. I disagree. As the Law Court recognized from the beginning, appearance is as much a part of the problem as reality in avoiding police coercion. Even though no police personnel attend such a collection box, citizens and business people might well feel it necessary to be seen publicly depositing a contribution. Thus, prohibiting the unattended collection box would not be an unconstitutional application of the statute. This same reasoning – the pressure to acquire a public reputation of having financially supported the police – explains why the Legislature can also prohibit a civilian from raising money for police activities or prohibit an advertising company from soliciting advertisements for police publications.

In his recommended decision, the Magistrate Judge suggests that the statute prohibits the sale of police publications such as the "Maine State Trooper" at an ordinary magazine stand along with the scores of other commercial magazines that might be placed for sale there. Although the Attorney General's Office agreed at oral argument that the statute prohibits such sales, I have serious doubt whether the statutory language permits

such an interpretation[9] or, for that matter, whether the Attorney General's office would incur the expense of enforcing the statute in such areas. I decline to find that this unlikely application of the statute is a substantial overbreadth.

These are the only examples that have been proposed in support of the plaintiffs' argument that the statute is substantially overbroad.[10] Even assuming that these examples are impermissible applications of the statute, they are insubstantial, and *Broadrick* teaches that the "overbreadth of a statute must not only be real, but substantial as well, judged in relation to [its] plainly

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[9] It is more reasonable to interpret the language that says a person "may not solicit property" to mean only requests for donations and not to include ordinary commercial transactions. I cannot believe the Legislature intended to prohibit such transactions as the sale of used police vehicles or furniture; police auctions of unclaimed property; or the sale of police publications at a newsstand where the law enforcement agency does not seek a donation but rather the fair exchange of consideration. This interpretation is reinforced by the legislative debate, which focused upon donative transactions. It is also supported by the Attorney General's Office regulations, which read: "[The statute] prohibits solicitation of *donations* that provide a tangible benefit to any law enforcement officer. . . . " Me. Dep't of Att'y Gen. ch. 109 (emphasis supplied). This lawsuit involves in part the solicitation of paid advertising in law enforcement periodicals. Although there may be a limited exchange of consideration in some of these transactions (law enforcement officers are a market for some businesses), such solicitation generally has a donative element as well, and the parties have treated it as such.

[10] They also assert that the statute is overbroad if it prohibits law enforcement personnel from soliciting other law enforcement personnel. But the Attorney General's Office agrees that the statute does not prohibit such solicitation.

legitimate sweep." *Broadrick v. Oklahoma*, 413 U.S. at 615. Here, for the reasons set forth by the Main Law Court in *Maine State Troopers Ass'n*, the bulk of the solicitation law "covers a whole range of easily identifiable and constitutionally proscribable . . . conduct." *Secretary of State of Md. v. J.H. Munson Co.*, 467 U.S. at 964-65. Accordingly, I must sustain it against the First Amendment overbreadth attack.[11]

The plaintiffs' other First Amendment arguments challenge whether the state's interest (avoiding the coercion it asserts lies inherently in police fundraising) is truly compelling.[12] They point out that the statute does not apply to fundraising by other state or local employees such as fire prevention personnel. The plaintiffs argue that citizens may feel equally coerced to contribute to fundraising requests by these other public servants. In addition, the statute permits police fundraising for activities that do not tangibly benefit the police. This category would include fundraising for unrelated charities such as the Special Olympics. The plaintiffs contend that all the concerns about inherent coercion are equally present in

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[11] Under the circumstances, if any overbreadth does exist in the statute, it can be cured on a case-by-case basis. *See Broadrick v. Oklahoma*, 413 U.S. 601, 615-16 (1973).

[12] Some of these issues were implicit in the earlier version of the statute but were not raised before either the Law Court or the United States Supreme Court. *Stare decisis*, therefore, appears not to bar their being raised now. Moreover, *res judicata* does not bar the claim of all the plaintiffs here. I will, therefore, proceed to address these issues.

that kind of fundraising. Finally, the statute permits fundraising by law enforcement personnel who are campaigning to be elected as sheriff or to some other public office. Here, too, the plaintiffs maintain that any concerns about coercion are equally applicable. All these factors, the plaintiffs argue, show that the State does not really have a compelling interest in avoiding "inherent coercion." Instead, its willingness to tolerate "coercion" in these kinds of cases reflects that the avoidance of coercion is not such an important interest after all.

There are several problems with these arguments. First, the questions whether there is as much coercion in fundraising by fire and other civic personnel as in fundraising by police personnel and whether there is as much coercion in police fundraising for unrelated activities as for police-related activities are open to debate. They are clearly matters on which reasonable minds may differ. Although the issues could perhaps be resolved through an empirical survey with statistical data and analyses, no such evidence is presented here. And I certainly cannot take judicial notice that all such fundraising is equally coercive. It is true that a court's role is to make an independent First Amendment analysis of a statute, determining whether a state interest can be treated as compelling and whether a statute is sufficiently narrowly drawn. *John Donnelly & Sons v. Campell*, 639 F.2d 6, 8 (1st Cir. 1980) *aff'd* 453 U.S. 916 (1981). But the underlying factual premises, at least when the matter is open to doubt, must be left to the Legislature. *Cf. International Society for Krishna Consciousness, Inc. v. Lee*, ___ U.S. at ___, 60 U.S.L.W. at 4759 (Kennedy, J., concurring). I therefore

accept the legislative premise that these types of fundraising are different. (And if the Legislature has misjudged in believing that the other types of solicitation are less coercive, that misjudgment surely should not destroy the validity of the prohibition on police solicitation that clearly is coercive, specifically the instances where the statute has already been upheld by the Law Court and the United States Supreme Court.)

Second, the Law Court's and the United States Supreme Court's recognition in *Maine State Troopers' Ass'n* that avoiding the coercion inherent in police fundraising can be a compelling state interest means that the State must be able to seek to avoid it where it can. It need not prohibit it in every conceivable instance in order to have a constitutional statute. In the Hatch Act cases, for example, the United States Supreme Court has clearly recognized that government can forbid partisan political activity by civil servants even though it does not extend the prohibition to other types of political activity. *See, e.g., United States Civil Service Comm'n v. National Ass'n of Letter Carriers*, 413 U.S. 548, 556 (1973); *United Public Workers v. Mitchell*, 330 U.S. 75, 100 (1947). When a legislature undertakes to address social problems, courts are not to fault it for failing to address every instance immediately. *See, e.g., Broadrick v. Oklahoma*, 413 U.S. at 607 n.5.

Finally, what the State is regulating here is First Amendment activity. Thus, there is a countervailing interest on the part of those who seek to engage in speech. The Legislature should, therefore, be permitted to attempt to draw its prohibition as narrowly as possible and not encompass within the prohibition more than it believes necessary. If there is doubt whether fire or other civic

personnel fundraising or fundraising for nonpolice charities is highly coercive, the Legislature should be able to recognize the First Amendment interest and permit such speech activities without thereby invalidating its prohibition on those forms of police fundraising that it is sure are coercive.

In the specific case of elections, a prohibition on campaign fundraising by law enforcement personnel would effectively disqualify them from an office such as sheriff for, unless they were independently wealthy, they could easily be outspent by opponents who were not in law enforcement. I am not prepared to say that the State of Maine may not choose its sheriffs by election or that, having decided to do so, it must make it well-nigh impossible for a law enforcement officer to win the office. This interest in the electoral process is itself a First Amendment interest.[13] To the extent that law enforcement officers can run for other public offices,[14] restrictions on fundraising are imposed – no fundraising in uniform or with a badge, 25 M.R.S.A. § 3711 (also applicable to sheriff's elections); no fundraising for one's own campaign for a nonpartisan office, 25 M.R.S.A. § 3712; no use of coercion in fundraising, 25 M.R.S.A. § 5713(2). *See also* 30-A M.R.S.A. § 355(3) (specific limitations on sheriffs and deputies). Unfortunately, the parties have not

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[13] In *Burson*, the Supreme Court said that speech engaged in during a political campaign is the most important interest the First Amendment can protect. *Burson v. Freeman*, ___ U.S. at ___, 60 U.S.L.W. at 4395.

[14] There are substantial restrictions. *See, e.g.*, 30-A M.R.S.A. § 355(2).

addressed the scope of law enforcement personnel's ability to run for public office under Maine statutes, and to solicit money in that connection; my citations therefore may be incomplete. But the First Amendment interest in speech during political campaigns is certainly a more than adequate basis for the State's exception of these campaigns from the law enforcement fundraising prohibition, especially given the restrictions I have noted.

The First Amendment does not command perfection. In a statute affecting speech, *some* degree of over-inclusiveness or under-inclusiveness is generally unavoidable. Where a compelling state interest is at stake, the First Amendment requires simply that the restriction be drawn as narrowly as possible without jeopardizing the State's ability to achieve its desired end. I find no reason to deviate from the conclusion reached by the Maine Law Court and the United States Supreme Court that Maine has a compelling interest in avoiding the coercion it finds inherent in police fundraising. I also conclude that the statute as amended is narrowly drawn to accomplish that compelling interest and that it is not substantially overbroad. To require the State to draw its restrictions more narrowly would cripple its ability to prevent police coercion. And it would make little sense to void the statute for failing to impose the restriction more broadly than it has, given the other First Amendment interests at stake.

III. Equal Protection Challenge

The plaintiffs' final challenge to the statute is that it discriminates among speakers and different kinds of speech in violation of the Equal Protection clause of the

Fourteenth Amendment. The same analysis – is there a compelling state interest and is the statute narrowly drawn to achieve the goal? – applies when the statute is measured against the equal protection clause. *See, e.g., Carrey v. Brown*, 442 U.S. 460 (1980); *Police Dep't of the City of Chicago v. Mosley*, 408 U.S. 92 (1972). For the same reasons that I have found that the statute meets the First Amendment challenge, I find that it also meets the Fourteenth Amendment challenge.

IV. Relief

Declaratory judgment shall therefore be entered and the statute is unconstitutional insofar as it is to be enforced by injunctive relief, but that shorn of the injunctive remedy the statute is constitutional. The lawyers shall meet and confer, and inform the Court by August 10, 1992, whether any injunctive relief is necessary and, if so, propose the form of injunction.

Since the plaintiffs have succeeded on a significant issue in this case and have achieved "some of the benefit [they] sought in bringing [the] suit," I find that they are a prevailing party within the meaning of 42 U.S.C. § 1988 and *Texas State Teachers Ass'n v. Garland Independent School Dist.*, 489 U.S. 782, 791 (1989), and are therefore entitled to an award of attorney fees. The plaintiffs shall prepare a proposed award of attorney fees reflecting their work on the issue on which they prevailed and present it to the defendants' lawyers for review within ten (10) days. The proposed award shall be filed with the Court by August 10, 1992. If the lawyers are unable to agree, they shall file

by that date respective statements concerning the reasons why they cannot agree. No costs are awarded.

IT IS SO ORDERED.

Dated at Portland, Maine this 13th day of July, 1992.

/s/ D. Brock Hornby
D. Brock Hornby
United States
District Judge

UNITED STATES DISTRICT COURT

DISTRICT OF MAINE

AUBURN POLICE UNION, et al., *Plaintiffs*	)	*Civil No. 91-0292-P-H*
v.	)	
MICHAEL E. CARPENTER, as Attorney General of the State of Maine, *Defendant*	)	

RECOMMENDED DECISION ON CROSS-MOTIONS FOR JUDGMENT ON THE BASIS OF A STIPULATED RECORD

(Filed Jan. 30, 1992)

On February 7, 1991 this court struck down as unconstitutional section 3702 of the version of the Solicitation by Law Enforcement Officers Act ("Act") then in effect, 25 M.R.S.A. §§ 3701-06 (1988), on facial overbreadth, prior restraint and equal protection grounds. *Auburn Police Union v. Tierney*, 756 F. Supp. 610 (D. Me. 1991) (*"Auburn Police I"*). Following that ruling the Maine Legislature repealed some exceptions to the Act and enacted a modified version of the law restricting solicitation by and on behalf of law-enforcement personnel.

In this lawsuit challenging the constitutionality of section 3702-A of the amended Act, 25 M.R.S.A. §§ 3701-03, the plaintiffs and defendant Michael E. Carpenter, attorney general of the state of Maine ("State" or "defendant"), seek judgment on the basis of a stipulated written record. This procedural device allows a court to

resolve any lingering issues of material fact in reaching its decision on the merits. *Boston Five Cents Sav. Bank v. Secretary of the Dep't of Hous. & Urban Dev.*, 768 F.2d 5, 11-12 (1st Cir. 1985).

The record reveals that in the aftermath of *Auburn Police I* the essential facts have not changed. The plaintiff police unions and police officers[1] want to solicit, and since *Auburn Police I* have solicited, advertising from the general public for inclusion in publications, Stipulated Facts ¶¶ 24-28; plaintiff Charles Underwood wishes to advertise in and receive copies of police publications, *id.* ¶ 13; and plaintiff R.H. McKnight Co., Inc. d/b/a Brent-Wyatt East, a professional fundraiser and publisher, seeks to solicit, and since *Auburn Police I* has solicited, advertisements for publications on behalf of the plaintiff unions and officers, *id.* ¶¶ 14, 21, 25. The new Act effectively bars all of the plaintiffs' activities listed above by virtue of its prohibition against solicitation of property from the general public "when the property or any part of that property in any way *tangibly* benefits, is intended to *tangibly* benefit or is represented to be for the *tangible* benefit of any law enforcement officer, law enforcement agency or law enforcement association. . . . " 25 M.R.S.A.

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[1] Union plaintiffs are the Auburn Police Union, Stipulated Facts ¶ 7, the Portland Police Benevolent Association, *id.* ¶ 8, and the Lewiston Police Union (a/k/a Local 545, International Brotherhood of Police Officers), *id.* ¶ 9. All are Maine not-for-profit corporations. *Id.* ¶¶ 7-9. Police-officer plaintiffs are Leonard Dexter, vice president of the Portland Police Benevolent Association, *id.* ¶ 10, Kevin MacDonald, secretary of the Portland Police Benevolent Association, *id.* ¶ 11, and David B. Chamberlain, secretary of the Lewiston Police Union, *id.* ¶ 12.

§ 3702-A (emphasis added). Section 3702-A of the amended Act is substantively identical to section 3702 of the prior version except for the addition of the modifiers "tangible" and "tangibly."[2] However, in addition to

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[2] Proposed rules drafted by the defendant define the italicized terms as follows:

> 109.1 SOLICITATIONS THAT TANGIBLY BENEFIT LAW ENFORCEMENT
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> A solicitation tangibly benefits a law enforcement agency, officer, or association if the proceeds of that solicitation are used, represented to be used, or intended to be used to support a law enforcement program or purpose which a law enforcement agency or association otherwise would have to fund through its own budgeting mechanisms. Examples of solicitations which tangibly benefit law enforcement are as follows: (1) A solicitation which raises money from community members to pay for the purchase of equipment for a local police department; (2) A solicitation to send an officer into school classrooms to conduct anti-drug abuse training (the money paying for the officer's salary and for education materials); and (3) The solicitation of funds for erection of a monument to memorialize slain officers. . . .
>
> 109.2 SOLICITATIONS THAT DO NOT TANGIBLY BENEFIT LAW ENFORCEMENT
>
> A solicitation of money for purposes completely unrelated to law enforcement, such as for a charity unrelated to law enforcement, does not confer a tangible benefit on law enforcement even if the solicitation effort increases good will toward law enforcement. For example, if police officers engage in solicitations of money for earthquake victims in South America, and if no law enforcement agency, officer, or association receives, is intended to receive, or is represented to receive any of the proceeds of the solicitation, then that solicitation program will *not* tangibly benefit law enforcement.

replacing section 3702 with section 3702-A, the Legislature repealed, or let expire on their own terms, exceptions to the old law which exempted certain activities of the Department of the Attorney General, 25 M.R.S.A. § 3706 (repealed), and state warden service associations, 25 M.R.S.A. § 3702 (repealed), exempted the sale by non-law-enforcement officers of advertising space in promotional and educational publications of the Department of Inland Fisheries and Wildlife, 25 M.R.S.A. § 3705 (repealed), and exempted solicitation for a memorial to slain police officers, Priv. & Spec. Laws 1989 ch. 47 and Priv. & Spec. Laws 1990 ch. 114 (expired). Violation of section 3702-A is punishable as an unfair-trade practice. 25 M.R.S.A. § 3702-A.

As in *Auburn Police I*, the plaintiffs charge that the State, in violation of 42 U.S.C. § 1983, has deprived them of rights secured under the United States Constitution. Specifically, they contend that section 3702-A violates the First and Fourteenth Amendments in that it is unconstitutionally overbroad, serves as an unconstitutional prior restraint on their freedom of speech and denies them

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Appendix B (ch. 109: Rules Concerning Unfair Trade Practices and Charitable Solicitations by Law Enforcement Officers) to Defendant Attorney General Michael E. Carpenter's Memorandum in Support of His Request for Judgment on the Stipulated Record.

Besides the addition of these qualifying modifiers, section 3702-A differs from repealed section 3702 only in the respect that it does not contain the so-called "wardens exception" which, in any event, was effectively neutralized by the Supreme Judicial Court of Maine in *State v. Maine State Troopers Ass'n*, 491 A.2d 538 (Me.), *appeal dismissed*, 474 U.S. 802 (1985).

equal protection of the laws.[3] On these grounds they seek, pursuant to 28 U.S.C. § 2201, a declaratory judgment that section 3702-A is unconstitutional, as well as preliminary and permanent injunctions against enforcement of section 3702-A and recovery of attorney fees and costs pursuant to 42 U.S.C. § 1988.

For the reasons spelled out below, I recommend that the court grant the plaintiffs' motion and deny the defendant's motion. Section 3702-A suffers from the same constitutional infirmities that led to the demise of repealed section 3702. Accordingly, I recommend that this court permanently enjoin enforcement of section 3702-A and award the plaintiffs attorney fees and costs pursuant to 42 U.S.C. § 1988.

I. EFFECT OF PRECEDENT

Both parties assert that decisions resolving challenges to prior versions of the Act are binding on the court in this case. In 1985 the Supreme Court summarily dismissed an appeal from a Maine Supreme Judicial Court ("Law Court") decision rejecting constitutional challenges to the Act. *State v. Maine State Troopers Ass'n*, 491 A.2d 538 (Me.), *appeal dismissed*, 474 U.S. 802 (1985) ("*MSTA*"). However, in *Auburn Police I* this court held that the substantive issues in that case fundamentally diverged from those in *MSTA* thereby undermining "the

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[3] Although the Act applies to all law-enforcement agencies, officers and associations, 25 M.R.S.A. § 3702-A, the plaintiffs base their legal claims on its impact upon non-profit, or charitable, law-enforcement associations.

binding force of the Supreme Court's summary dismissal and the Law Court's own conclusions." *Auburn Police I*, 756 F.Supp. at 616. The State urges that, because it has since repealed exceptions to the Act, some of which were enacted after the Supreme Court's summary dismissal of the *MSTA* appeal and rendered repealed section 3702 constitutionally defective, *MSTA* is now once again binding upon the court. Defendant Attorney General Michael E. Carpenter's Memorandum in Support of His Request For Judgment on the Stipulated Record ("Defendant's Memorandum") at 13-15. The plaintiffs respond that repeal of the exceptions has no effect and that the court's prior decision in *Auburn Police I*, not *MSTA*, is controlling. Plaintiffs' Reply to Defendant's Memorandum in Support of His Request for Judgment on the Stipulated Record at 6-10.

The court in *Auburn Police I* held that the premise on which the Law Court relied in deciding *MSTA* was no longer valid and that therefore the Supreme Court's summary dismissal ceased to be binding. *Auburn Police I*, 756 F. Supp. at 616. Once it ceased to be binding, it ceased to be binding for all time. Just as the proverbial egg cannot be unscrambled, neither can the Act's post-*MSTA* legislative history be ignored.[4] In any event, the court has before it a challenge to the constitutionality of a new statutory scheme, albeit one which addresses the same general issue of solicitation by and on behalf of law-

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[4] There is no indication in *MSTA* that the Law Court considered the effect on the Act's constitutionality of section 3703 which permits fundraising by and for law-enforcement personnel campaigning for public office.

enforcement personnel that was presented in *MSTA*. *MSTA* is not a precedential bar to the court's consideration of this new challenge. Nor is *Auburn Police I a fortiori* determinative of the outcome of the present litigation since the version of the law now under attack differs from that at issue there.

II. UNCONSTITUTIONAL OVERBREADTH

The plaintiffs contend that section 3702-A is impermissibly overbroad because it prohibits entirely a class of protected speech – the plaintiffs' solicitations – without advancing a substantial governmental interest by the least restrictive means available. Complaint ¶ 42.

A statute may be overbroad "if in its reach it prohibits constitutionally protected conduct." *Grayned v. City of Rockford*, 408 U.S. 104, 114 (1972). Normally, such overbreadth in the application of the law must be substantial in order to warrant a finding of unconstitutionality. *New York v. Ferber*, 458 U.S. 747, 768-69 (1982). However, the Supreme Court has established that a statute may be held overbroad on its face if "in all its applications [it] directly restricts protected First Amendment activity and does not employ means narrowly tailored to serve a compelling governmental interest." *Secretary of State of Md. v. Joseph H. Munson Co.*, 467 U.S. 947, 965-66 n.13 (1984) ("It was on [this] basis . . . that the Court in *[Village of] Schaumburg [v. Citizens for a Better Env't*, 444 U.S. 620, *reh'g denied*, 445 U.S. 972 (1980)] struck down the village ordinance as unconstitutional"). To be narrowly tailored the State's method must be the least restrictive means available.

Sable Communications of Cal., Inc. v. Federal Communications Comm'n, 492 U.S. 115, 126 (1989).

It is well recognized that "charitable solicitations 'involve a variety of speech interests . . . that are within the protection of the First Amendment,' and therefore have not been dealt with as 'purely commercial speech.' " *Riley v. National Fed'n of the Blind of N.C., Inc.*, 487 U.S. 781, 788 (1988) (quoting *Village of Schaumburg*, 444 U.S. at 632). Consequently, section 3702-A, which directly restricts protected First Amendment activity, is subject to "exacting First Amendment scrutiny." *Id.* at 789.

The State asserts that it has a compelling interest in prohibiting all solicitation that tangibly benefits law-enforcement personnel because such solicitation is inherently coercive. Defendant's Memorandum at 16; Defendant Attorney General Michael E. Carpenter's Reply Memorandum in Support of His Request for Judgment on the Stipulated Record at 4; P.L. 1991, ch. 510, § 5 (Legislative intent).[5] Indeed, Maine has a compelling interest in

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[5] The Legislature set forth its rationale for enacting section 3702-A in a statement of purpose. The statement reads in pertinent part as follows:

> This Act clarifies and reaffirms that the primary and compelling purpose underlying the laws governing solicitation by law enforcement officers is to eliminate the coercion that is inherent in solicitations by and on behalf of law enforcement officers by prohibiting such solicitations. . . . In addition to the effect on the prospective donor, the appearance of the transaction to 3rd persons may undermine public confidence in the integrity of the public office. At least the appearance of coercion inheres in every solicitation that tangibly benefits law enforcement agents and the

preserving the appearance of integrity of its law-enforcement personnel; by prohibiting behavior that is or may be viewed as coercive it can be said that the Legislature furthers that interest.

The State's assertion notwithstanding, it continues to except from its ban solicitation by or on behalf of law-enforcement officers campaigning for election to public office. *See* 25 M.R.S.A. § 3703. In doing so, the State undermines the very premise on which the key provision of the Act is grounded – that the appearance of coercion inheres in every solicitation that tangibly benefits law-enforcement personnel – and effectively admits that even its present ban sweeps too broadly. *See Auburn Police I*, 756 F. Supp. at 618.

Moreover, in an effort to circumscribe the appearance of coercion the Legislature has also failed to narrowly draw its statute to accomplish its stated purpose by the least restrictive means available. The broad sweep of section 3702-A prohibits, among other things, the sale of the plaintiffs' publications such as the magazine *Maine*

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appearance undermines the integrity of the office. The Legislature finds that the State has a compelling interest in preserving the integrity of law enforcement officers and finds that regulating all law enforcement solicitations that tangibly benefit law enforcement is necessary to promote this compelling state interest. . . . The Legislature further finds that solicitations for charitable purposes unrelated to law enforcement activities are not inherently coercive because the person solicited will know that law enforcement agencies or officers do not gain any tangible benefit and, consequently, will not be concerned with who donates.

State Trooper, see attachment to Stipulated Facts ¶ 25, in stores or through vending machines. Fundraising for, say, the policemen's ball through the placement of unattended change buckets with an accompanying explanatory display on store checkout counters or in movie theatre lobbies would be prohibited. These are but a few examples of revenue-raising methods for projects tangibly benefiting law-enforcement personnel that are free of even the appearance of coercion because citizens would understand that the elements of coercion – the pressure of personal contact, the perception that law-enforcement personnel are aware of who gives and who does not and the attendant expectation that failure to give may yield a negative consequence or that a contribution may produce some special treatment – are absent.[6] Additionally, as the plaintiffs argue, solicitation of law-enforcement personnel by or on behalf of other law-enforcement personnel – which is also banned – does not logically raise a concern

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[6] The plaintiffs offer other examples of solicitation that they believe do not appear coercive. One example involves solicitation by third-party professionals on behalf of law-enforcement personnel who assure those solicited that they are not law-enforcement officers and that the names of those solicited will never be revealed to law enforcement. Plaintiffs' Memorandum Brief in Support of Their Motion for Summary Judgment at 22-24. The State would be legitimately wary of such a scenario because it requires an element of public trust in the individuals hired for professional solicitation that may not be warranted, especially in the case of direct solicitation by telephone, or door-to-door. Citizens might reasonably perceive coercion when directly solicited by someone they do not know who claims to represent law enforcement and who promises anonymity. They may not feel that they can trust such assertions and, thus, would be constrained to act out of fear, not freedom.

about the appearance of coercion of the kind that undermines public confidence in our law-enforcement institutions. *See* Plaintiffs' Memorandum Brief in Support of Their Motion for Summary Judgment ("Plaintiffs' Memorandum") at 31.

By asserting without any supporting empirical evidence[7] that *any* solicitation that tangibly benefits law-enforcement personnel is inherently coercive, the State

> has taken the *effect* of the statute and posited that effect as the State's interest. If accepted, this sort of circular defense can sidestep judicial review of almost any statute, because it makes all statutes look narrowly tailored. . . . "Every content-based discrimination could be upheld by simply observing that the state is anxious to regulate the designated category of speech."

Simon & Schuster, Inc. v. Members of the New York State Crime Victims Bd., 60 U.S.L.W. 4029, 4033 (U.S. Dec. 10,

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[7] The Supreme Court rejected the state of Illinois' assertions in *Peel v. Attorney Registration & Disciplinary Comm'n of Ill.*, 110 S. Ct. 2281, 2291 (1990), that, even though it was "[l]acking empirical evidence to support its claim," the Illinois Supreme Court's inherent authority to "supervise its own bar" required the Supreme Court to defer to the state court in determining whether specific statements were protected by the First Amendment. The Court noted that the fact that the state supreme court is exercising its power to review the actions of the state bar commission "does not insulate it from our review for constitutional infirmity." *Id.* at 2292 (citations omitted). Here, the state of Maine provides no empirical data whatsoever and simply asserts that the court must deferentially accept at face value the Legislature's finding that the appearance of coercion inheres in all solicitation benefiting law-enforcement personnel. *Peel* makes clear that this is not so.

1991) (quoting *Simon & Schuster, Inc. v. Fischetti*, 916 F.2d 777, 785 (2d Cir. 1990) (Newman, J., dissenting)) (emphasis in original).

Further, the plaintiffs point out that by limiting its proscription to solicitation that tangibly benefits law-enforcement personnel the State has effectively carved out a new exception, namely all solicitation that does not confer such a benefit. In doing so, the State makes a constitutionally unsupportable distinction based on the false premise that coercion, or the appearance thereof, depends on who is benefited from law-enforcement solicitation rather than on who solicits and in what manner. When solicitation is conducted by or for law-enforcement personnel, it matters not whether the property solicited will tangibly benefit them. As the plaintiffs argue, "How is it less coercive for a policeman to solicit on behalf of Special Olympics than for a policeman to solicit on behalf of the family [of] a fellow officer wounded in the line of duty?" *See* Plaintiffs' Memorandum at 22.

The likelihood of coercion inheres, if at all, in the fact that law-enforcement personnel care enough about a particular project to take it on as their own. In doing so, they communicate to the public an interest that is virtually indistinguishable from one that confers a tangible benefit on such personnel. When a policeman or police union solicits funds for a worthy cause, such as Special Olympics, the average citizen has as much reason to be concerned about the consequences of his response as when he is solicited to purchase an advertisement in the *Maine State Trooper*. The blanket exception in section 3702-A for

solicitation that does not tangibly benefit law-enforcement personnel renders the regulatory scheme underinclusive and thereby undermines the legitimacy of the scope of the prohibition. *See Simon & Schuster, Inc.*, 60 U.S.L.W. at 4034 (Blackmun, J., concurring).

In *Auburn Police I* the State was admonished that, "[t]o resurrect its statute, [it] must isolate the elements of police solicitation that produce coercion and then tailor its statute to root them out evenhandedly." *Auburn Police I*, 756 F. Supp. at 618. This the State has not done. All forms of the plaintiffs' charitable solicitations are protected speech. The present statute prohibits many of them without identifying articulable characteristics that are a suitable proxy for the appearance of coercion. I find that a complete prohibition of solicitation limited to that which tangibly benefits law-enforcement personnel is not narrowly tailored to Maine's evident interest in banning solicitation that is inherently coercive, and therefore section 3702-A is, like its predecessor, unconstitutionally overbroad and invalid on its face.

III. PRIOR RESTRAINT

As in *Auburn Police I*, the plaintiffs contend that the Act constitutes an impermissible prior restraint because it prohibits them from exercising their constitutionally protected right of charitable solicitation, Complaint ¶¶ 35, 37, 39, and thereby undermines their financial ability to publish protected speech, Complaint ¶¶ 36-39.

The Supreme Court has held that "[a]ny system of prior restraints of expression comes to this Court bearing a heavy presumption against its constitutional validity."

Bantam Books, Inc. v. Sullivan, 372 U.S. 58, 70 (1963) (citations omitted). The Court has specifically noted that the doctrine of prior restraint applies to the act of charitable solicitation. *Munson*, 467 U.S. at 968-69. Several lower courts have struck down schemes for licensing solicitors for charity and for screening their messages or proscribing them. *See Famine Relief Fund v. West Virginia*, 905 F.2d 747, 753 (4th Cir. 1990); *Telco Communications, Inc. v. Carbaugh*, 885 F.2d 1225, 1232-34 (4th Cir. 1989), *cert. denied*, 11 S. Ct. 1923 (1990); *Telco Communications, Inc. v. Barry*, 731 F. Supp. 670, 682-83 (D.N.J. 1990). *See also Auburn Police I*, 756 F. Supp. at 618-19. Maine's revised Act constitutes a prior restraint. It "silences by fiat an entire category of charitable solicitation. It is in this respect a form of censorship; it prejudges rather than punishes after the fact." *Id.* at 618. For the reasons articulated above in connection with the overbreadth analysis, I remain convinced that the State's legitimate interest in protecting against coercive law-enforcement solicitation is not great enough to justify such prior restraint.

IV. EQUAL PROTECTION

The State's distinction between solicitation for law-enforcement officers running for public office, on the one hand, and all other law-enforcement solicitation, on the other, offends the plaintiffs' Fourteenth Amendment right to equal protection of the laws. "A state must demonstrate a substantial governmental interest for discrimination that implicates First Amendment rights." *Auburn Police I*, 756 F. Supp. at 619 (citing *Police Dep't of the City of Chicago v. Mosley*, 408 U.S. 92, 98-99 (1972)). While the State certainly has an interest in not hampering law-

enforcement personnel from running for public office in circumstances where they are not otherwise legitimately restricted from doing so, it can demonstrate no substantial basis for discriminating between this tangible benefit to law enforcement, which it permits, and all other tangible benefits to law enforcement, which it prohibits. Solicitation to advance the election of law-enforcement personnel is no less inherently coercive nor more worthy than other causes for which solicitation tangibly benefiting such personnel might be conducted. *Cf. Mosley*, 408 U.S. at 100 (peaceful non-labor picketing no more disruptive than peaceful labor picketing). Consistent with its earlier effort, "The State has impermissibly chosen among causes for which it will lift its heavy burden on free-speech interests." *Auburn Police I*, 756 F. Supp. at 619 (citing *id.* at 97-98).

V. RELIEF

The plaintiffs seek, *see* Complaint, section IX, and should be granted, declaratory and injunctive relief and attorney fees. "Declaratory relief is a matter of discretion . . . [and] is appropriate when it will 'serve a useful purpose in clarifying the legal relations in issue' or 'terminate and afford relief from the uncertainty, insecurity, and controversy giving rise to the proceeding.' " *Auburn Police I*, 756 F. Supp. at 619 (quoting *President v. Vance*, 627 F.2d 353, 364 n.76 (D.C. Cir. 1980)) (citations omitted). The plaintiffs as well as other parties whose activities are encompassed by the Act are best served by a declaration of the status of the law.

In order to be entitled to a permanent injunction, the plaintiffs must (1) demonstrate that they have been directly injured or are in immediate danger of being directly injured by the challenged conduct, (2) show that the conduct has continuing impact into the future or there is a likelihood that the defendant will engage in that conduct in the future and (3) establish that they are subject to "continuing irreparable injury for which there is no adequate remedy at law." *Lopez v. Garriga*, 917 F.2d 63, 67-68 (1st Cir. 1990). The stipulated facts make plain that the plaintiffs have already been directly injured by the Act in that publishers of their magazines will not assist them in solicitation because of the threat of its enforcement, Stipulated Facts ¶ 17, which adversely affects both the law-enforcement associations and the publishers. The plaintiffs present uncontroverted testimony that the Act would severely damage their ability to fund their speech activities, including the publication of their trade magazines. Affidavit of Plaintiff Auburn Police Union ¶ 5 (Exh. C to Stipulated Facts); Affidavit of Plaintiff Portland Police Benevolent Association ¶ 5 (Exh. D to Stipulated Facts). Although the plaintiffs have successfully attacked the Act's constitutionality on the basis that it impermissibly limits their speech activities, a permanent injunction is appropriate to ensure that the plaintiffs and other parties to which the Act applies are not chilled from soliciting for fear of enforcement, as are the magazine publishers. The last criteria is met because "money damages cannot adequately compensate for the impermissible burden on the plaintiffs' freedom of expression." *Auburn Police I*, 756 F. Supp. at 619.

The plaintiffs should also be awarded attorney fees under 42 U.S.C. § 1988. "[I]t is well-established that a court may not deny an award of attorney's fees to a prevailing civil rights plaintiff in the absence of special circumstances rendering the award unjust. . . . " *De Jesus v. Banco Popular de Puerto Rico*, 918 F.2d 232, 234 (1st Cir. 1990) (citation omitted). No special circumstances have been raised or are evident in the record to warrant denial of the plaintiffs' request for attorney fees.

VI. CONCLUSION

For the foregoing reasons, I recommend that the court ***GRANT*** the plaintiffs' motion, and ***DENY*** the defendant's motion, for judgment on the basis of a stipulated written record. The court should permanently enjoin enforcement of 25 M.R.S.A. § 3702-A, declaring it unconstitutional on grounds that it is facially overbroad, operates as an impermissible prior restraint and violates the plaintiffs' right to equal protection of the laws. Finally, I recommend that attorney fees be awarded to plaintiffs pursuant to 42 U.S.C. § 1988.

NOTICE

A party may file objections to those specified portions of a magistrate's report or proposed findings or recommended decisions entered pursuant to 28 U.S.C. § 636(b)(1)(B) for which de novo review by the district court is sought, together with a supporting memorandum, within ten (10) days after being served with a copy thereof. A responsive memorandum shall be filed within ten (10) days after the filing of the objection.

Failure to file a timely objection shall constitute a waiver of the right to de novo review by the district court and to appeal the district court's order.

Dated at Portland, Maine this 30th day of January, 1992

/s/ David M. Cohen
David M. Cohen
United States Magistrate Judge

Attest by William B. Brownell, Clerk

By /s/ Illegible
Deputy Clerk

Supreme Court, U.S.
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No. 93-1281

In The

Supreme Court of the United States

October Term, 1993

AUBURN POLICE UNION, ET AL.,

Petitioners,

v.

MICHAEL E. CARPENTER,
ATTORNEY GENERAL OF THE STATE OF MAINE,

Respondent.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The First Circuit

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

Does a Maine statute which prohibits solicitations of property from the general public if the property will tangibly benefit a law enforcement officer, law enforcement agency or law enforcement association violate the First and Fourteenth Amendments to the United States Constitution?

LIST OF PARTIES

In addition to the Auburn Police Union, the Petitioner named in the caption, the Portland Police Benevolent Association, the Lewiston Police Union, Leonard Dexter, Kevin MacDonald, David B. Chamberlain, R.H. McKnight Company, Inc., and Charles Underwood are petitioners in this case. Michael Carpenter, Attorney General of the State of Maine, is the only respondent.

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On Petition For Writ Of Certiorari To The United States Court Of Appeals For The First Circuit

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

Michael E. Carpenter, Attorney General of the State of Maine, Respondent, respectfully files this brief opposing the petition for writ of certiorari to review the judgment of the United States Court of Appeals for the First Circuit in this case.

OPINIONS BELOW

The opinion of the First Circuit Court of Appeals (Appendix to Petition at 1a-43a) [hereinafter referred to

as App. ___] is reported at 8 F.3d 886. The opinion of the District Court for the District of Maine (App. 44a-62a) is reported at 798 F.Supp. 819.

JURISDICTION

The judgment of the First Circuit Court of Appeals was entered November 12, 1993. The jurisdiction of this Court is invoked under 28 U.S.C. §1254(1).

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

First Amendment to the United States Constitution.

Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

Fourteenth Amendment to the United States Constitution, Sec. 1.

All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty, or property, without due process of law; nor deny

to any person within its jurisdiction the equal protection of the laws.

25 Me. Rev. Stat. Ann. §3702-A (1993).

A person may not solicit property from the general public when the property or any part of the property in any way tangibly benefits, is intended to tangibly benefit or is represented to be for the tangible benefit of any law enforcement officer, law enforcement agency or law enforcement association. Any violation of this chapter constitutes a violation of the Maine Unfair Trade Practices Act.

STATEMENT OF THE CASE

Respondent adopts the statement of the facts and procedural history contained in the decision of the Court of Appeals for the First Circuit below. App. 2a-11a.

REASONS FOR DENYING THE WRIT

In 1977, the Maine Legislature enacted the Solicitation by Law Enforcement Officers Act. 25 Me. Rev. Stat. Ann. §3701 *et seq.* The Act prohibited solicitations by or on behalf of police officers, police associations or police agencies if those solicitations benefited law enforcement. 25 Me. Rev. Stat. Ann. §3702.

In 1985 the Maine Supreme Judicial Court upheld the constitutionality of the Act against its first challenge. *State of Maine v. Maine State Troopers Ass'n. ("MSTA")*, 491

A.2d 538 (1985). The Supreme Judicial Court concluded that the Act was premised upon a finding by the Maine Legislature that "solicitation by a law enforcement agency is inherently coercive." *Id.*, 542-43. Additionally, the Supreme Judicial Court concluded that

> The State's interest in protecting the reputation of its law enforcement bodies is undeniably substantial. Indeed we would be hard pressed to suggest a weightier interest.

Id.

The defendant Maine State Troopers Association then filed an appeal to this Court. In 1985, this Court dismissed the *MSTA*'s appeal for want of a substantial federal question. 474 U.S. 802 (1985).

Between 1985 and 1990 the Maine Legislature enacted a number of amendments to the Act. The same plaintiffs as in the instant suit challenged the constitutionality of the amended Act in the United States District Court for the District of Maine. In February 1991, the District Court held the Act, as amended, unconstitutional. *Auburn Police Union v. Tierney*, 756 F.Supp. 610 (D. Me. 1991). In particular, the District Court found that the amendments enacted since *MSTA* had undercut the State's compelling interest in prohibiting police solicitations. *Id.*, 756 F.Supp. 610, 618.

In 1991, after the District Court's decision in *Auburn Police Union v. Tierney*, the Maine Legislature repealed the amendments found offensive by the District Court and re-enacted the prohibition on solicitations by law enforcement officers as it existed in 1985 with one change. Me. P. L. 1991 Chapter 510. Specifically, the Legislature

added the word "tangibly" prior to the word "benefits" in the statute to "clarif[y] that the ban on solicitation applies only when the solicitations provide a tangible benefit to law enforcement." Sen. Amend.B. to L.D. 1682 (115th Legis. 1991). This current version of the Act was upheld in this litigation against broad constitutional challenge by the District Court (App. 44a-62a) and the First Circuit Court of Appeals. App. 1a-43a.[1]

The State of Maine urges that this Court deny the Petition for Writ of Certiorari for three reasons. First, the Decision of the First Circuit does not conflict with any decisions of this Court, any Courts of Appeals or any of the highest state courts. Second, the decision below correctly applies precedent from this Court. Finally, the First Circuit's decision will not have broad national impact because Maine is the only state which has enacted a statute prohibiting solicitations by or on behalf of police officers.

I. THE DECISION BELOW DOES NOT CONFLICT WITH ANY DECISION OF THIS COURT OR ANY COURT OF APPEALS

The decision below of the First Circuit Court of Appeals does not conflict with any decision of the United

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[1] The District Court, while upholding the statute against claims of overbreadth, underinclusiveness and as applied invalidity, agreed with Petitioners' claims under the prior restraint doctrine and struck down the provision in the Act authorizing injunctive relief. App. 49a-52a. The First Circuit, however, found the Act to be constitutional in all respects and reversed the District Court's holding under the prior restraint doctrine. App. 38a-42a.

States Supreme Court, any of the Courts of Appeal or any highest states courts. Rather, as will be discussed in the next section, the First Circuit has correctly applied existing Supreme Court precedent in upholding the constitutionality of the Solicitation by Law Enforcement Officers Act. Moreover, Petitioners themselves do not refer to a single United States Supreme Court, Court of Appeals or highest state court decision that is in conflict with the decision below. Rather, Petitioners urge that the decision below "is discordant with the decisions of the District Courts in *Auburn Police Union v. Tierney,* 756 F.Supp. 610 (D. Me. 1991) and *Telco Communications v. Barry,* 731 F.Supp. 670 (D. N. J. 1990)." (Petition for Writ of Certiorari at p.8).

Petitioners' reliance on a purported conflict between the First Circuit's decision and the decisions of the Maine and New Jersey District Courts fails for two reasons. First, conflict between a decision of a Court of Appeals and a decision of a District Court is not the type of conflict considered so grave as to require resolution by the highest court in the country. This view is reflected in United States Supreme Court Rule 10-1(a) which provides that the Court, in exercising its discretion as to whether to grant a writ of certiorari, will consider whether a Court of Appeal's decision is "in conflict with the decision of another United States court of appeals on the same matter; or . . . with a state court of last resort. . . . " U.S. Sup.Ct.R. 10-1(a). Rule 10-1(a) does *not* provide that conflict between a decision of Court of Appeals and a decision of a District Court justifies the grant of discretion to issue a writ. *See* Stern, Gressman, Shapiro & Geller, *Supreme Court Practice* 178 (7th ed. 1993) ("The Supreme

Court will not grant certiorari to review a decision of a Federal Court of Appeals merely because it is in direct conflict on a point of federal law with a decision rendered by a District Court, whether in the same circuit or in another circuit.")

Second, neither of the two cited District Court cases are, in fact, in conflict with the decision of the First Circuit in this case. The Court of Appeals succinctly rejected the argument that the District Court's decision in [*Auburn Police Union v. Tierney*], was controlling:

> We find no merit in Plaintiffs' contention that [*Auburn Police Union v. Tierney,*], 756 F.Supp. 610, is stare decisis. This Court is not bound by a district court Opinion that was never appealed to, or affirmed in, this Court. *See* 1 B Moore's Federal Practice 0.402 [2], P.I-23 (1993). . . .

(App. 15a at n.10). Moreover, the statute before the Court of Appeals in this case had been amended to remove the exceptions which the District Court in *Auburn Police Union v. Tierney,* had found troublesome.

Petitioners' reliance on the District Court's decision in *Telco* is equally unavailing. In *Telco,* a New Jersey statute prohibited solicitations conducted by professional fundraisers but did not prohibit law enforcement officers from conducting those solicitations themselves. In analyzing the statute's purpose in preventing perceived or implicit coercion, the District Court concluded that there was no rational basis to distinguish (as the statute did) between solicitations by law enforcement officers themselves and solicitations by paid fundraisers. 731 F.Supp. 670, 679-80. The Maine statute, however, does not suffer from this infirmity because the Maine statute does

not distinguish between professional solicitors and law enforcement officers. Indeed, the District Court in *Telco* specifically reserved the question raised in the instant case as to whether a statute which prohibits *all* solicitations on behalf of law enforcement could withstand constitutional scrutiny. *Id.* 731 F.Supp. 670, 679 n.8.

The Court of Appeals' decision does not conflict with any decision of this Court, any other Court of Appeals or any highest state court. In fact, the decision below is absolutely consistent with the decision in the only other reported similar case: the Maine Supreme Judicial Court's 1985 decision in *MSTA*, as to which this Court dismissed the *MSTA*'s appeal for want of a substantial federal question.

II. THE DECISION OF THE FIRST CIRCUIT COURT OF APPEALS BELOW CORRECTLY APPLIED PRECEDENT FROM THIS COURT.

The First Circuit analyzed four major legal issues in upholding the constitutionality of the Solicitation by Law Enforcement Officers Act: overbreadth, underinclusiveness, unconstitutionality "as applied", and prior restraint. The court below relied upon and applied existing Supreme Court precedent in rejecting the first, second and fourth challenges to the constitutionality of the Act. With respect to the third challenge, the court correctly rejected Petitioners' argument on its facts.

A. Overbreadth

Relying upon and applying this Court's holding in *Hicks v. Miranda*, 422 U.S. 332, 343-45 (1975) and *Mandel v. Bradley*, 432 U.S 173 (1977), the First Circuit determined that the same overbreadth claim asserted here by Petitioners also was before the Court in *MSTA*. App. 15a-24a. This Court summarily dismissed the appeal in *MSTA* for want of a substantial federal question. 474 U.S. 802 (1985).

The Court of Appeals in the instant case, after a review of the papers before the Court in *MSTA*, concluded that, "[b]ecause §3702-A [the current version of the Act] is even narrower than the former §3702 [the provision existing at the time of *MSTA*], the Supreme Court's summary dismissal of *MSTA*, in which the Supreme Court necessarily rejected the overbreadth and compelling interest challenges . . . , is binding precedent on whether §3702-A is overbroad. . . . " (App. 23a-24a). The First Circuit properly relied upon the analysis required by *Hicks* and *Mandel* in holding that this Court's summary disposition of the appeal in *MSTA* had binding precedential effect on Petitioners' overbreadth claim in this case.

In analyzing the reach of the Supreme Court's summary affirmance in *MSTA*, the court below examined the overbreadth doctrine under both approaches to that doctrine taken by this Court: first, the doctrine of substantial overbreadth as enunciated in *New York v. Ferber*, 458 U.S. 747, 770 (1982) and, second, the approach requiring overbroad statutes to be supported by a compelling state interest and to be narrowly tailored to serve that interest.

Secretary of State of Maryland v. Joseph H. Munson Co., 467 U.S. 947, 965-66 n.13 (1984). App. 18a & 21a.

Even if this Court's dismissal of the appeal in *MSTA* were not binding precedent, Petitioners' overbreadth claims would fail under either approach to the overbreadth doctrine. With respect to the "substantial overbreadth" doctrine, the court below referred to two arguments advanced by Petitioners. First, Petitioners argued that the application of the Act to solicitations conducted through "unattended collection boxes" swept within the Act's prohibition conduct which was not inherently coercive. App. 19a. Second, Petitioners argued that the Act's coverage of solicitations by "private citizens unconnected with the police" was overbroad. *Id.*

The District Court specifically rejected these arguments in concluding that such solicitations did indeed create the risk of inherent coercion.

> As the [Maine Supreme Judicial Court] recognized from the beginning, appearance is as much a part of the problem as reality in avoiding police coercion. Even though no police personnel attend such a collection box, citizens and business people might well feel it necessary to be seen publicly depositing a contribution. Thus, prohibiting the unattended collection box would not be an unconstitutional application of the statute. This same reasoning – the pressure to acquire a public reputation of having financially supported the police – explains why the Legislature can also prohibit a civilian from raising money for police activities. . . .

App. 54a. The District Court also found that these hypothical applications of the Act, even if impermissible, would be insubstantial. App. 55a.

With respect to the overbreadth-compelling state interest doctrine, the legislative history analyzed by the Maine Supreme Judicial Court in *MSTA* makes clear that the Act serves the State's compelling interest in "protecting the reputation of its law enforcement bodies" by prohibiting "inherently coercive" solicitations by or on behalf of law enforcement. 491 A.2d 538, 542-43 (1985). Moreover, the Law Court stressed that the Act was indeed the least restrictive alternative.

> [B]ecause at least the appearance of coercion inheres in every solicitation on behalf of law enforcement agents, and because that appearance undermines the integrity of the office, the State has a compelling interest in regulating all law enforcement solicitations.

Id.

The First Circuit concluded that the overbreadth claim raised in *MSTA* is identical to the overbreadth claim raised by Petitioners in this case. Petitioners have not advanced any reason why this federal question is any more substantial now than it was in 1985 when this Court dismissed the *MSTA*'s appeal for want of substantiality.

B. Underinclusiveness.

The court below next addressed Petitioners' underinclusiveness argument under both the Equal Protection Clause and the First Amendment. App. 24a-34a. In rejecting, Petitioners' arguments of underinclusiveness, the

First Circuit relied upon this Court's guidance that to withstand a claim of underinclusiveness, "the State must be able to point to clear reasons for the distinctions drawn by the Act." App. 29a (citing and relying upon this Court's decisions in *Austin v. Michigan State Chamber of Commerce*, 494 U.S. 652, 666 (1990); and *Police Dept. of Chicago v. Mosley*, 408 U.S. 92, 95 (1972)). The court below then found that the Maine Legislature had " 'clear reasons' for the asserted exemptions from the Act's prohibitions, and the reasons are not only clear but rational. . . . " *Id.* at 34a.[2] Consequently, utilizing the standards enunciated by this Court in *Austin* and *Mosley*, the First Circuit properly held "that the Maine Act is not unconstitutionally underinclusive." *Id.*

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[2] The Court of Appeals addressed three arguments that the Act was underinclusive and with respect to each argument found that the state had a clear and rational reason for its distinctions. App. 32a-33a. First, the court found that, with respect to the exception for solicitations for charitable purposes unrelated to law enforcement, that "[t]he Legislature could reasonably conclude that [charitable solicitations] present sufficiently less likelihood of harm. . . . " App. 32a. Second, the court found that the Act's coverage of law enforcement officers and not other public employees was justified by the reasonable legislative conclusion "that police solicitation has a special potential for coercion not present in solicitation by other officials." App. 33a. Third, the court found that the statutory exception for law enforcement officers running for elective office (e.g., county sheriffs) was substantially justified by the First Amendment rights of those officers "to engage in campaign speech." App. 34a.

C. As Applied Challenge.

Petitioners argued to the First Circuit that the Solicitation by Law Enforcement Officers Act was unconstitutional as applied to Petitioners. The court below, relying not upon court precedent but upon an analysis of the facts, decided otherwise. Specifically, the Court of Appeals analyzed the solicitations which Petitioners sought to engage in and concluded that the "proposed solicitations remain inherently coercive, or at least do not remove the appearance of coercion and favoritism." App. 38a.[3] Consequently, the court below "reject[ed] [Petitioners'] argument that the Act is unconstitutional as applied." *Id.*

D. Prior Restraint.

The court below, in rejecting the District Court's conclusion that injunctions against police solicitation issued under the Act would violate the prior restraint doctrine,

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[3] Specifically, Petitioners pointed to that part of their proposed solicitation that would attempt to keep confidential the names of those persons who did *not* purchase advertising in law enforcement magazines. The First Circuit rejected Petitioners' argument that their proposal eliminated the coercion inherent in law enforcement solicitations.

> The advertisements will be public. Accordingly, law enforcement officers will be aware of who contributed and, by the absence of advertisements, of who did not contribute. Moreover, those solicited may not believe, even if they are assured, that their names will not be communicated.

App. 37a.

adhered to existing Supreme Court precedent. Specifically, the court below relied upon *Pittsburg Press Co. v. Pittsburgh Comm'n on Human Relations*, 413 U.S. 376, 390 (1973) in concluding that

> An injunction that is narrowly tailored, based upon a continuing course of repetitive speech, and granted only after a final adjudication on the merits that the speech is unprotected does not constitute an unlawful prior restraint.

App. 40a. Consequently, the court found that the Act did not on its face constitute an impermissible prior restraint.

The Court of Appeals also noted that because the pending action involved a request for a declaratory judgment, no injunction restraining solicitation actually existed to be reviewed by the court. As a result, the court chose

> to let stand the Act's provision authorizing enforcement through injunctive relief and leave for another day the determination [under the *Pittsburgh Press* standard] whether a specific injunction – should the State decide to proceed in such a fashion – constitutes an unlawful prior restraint.

App. 41a-42a. The court below correctly rejected Petitioners' claim under the prior restraint doctrine.

III. THE FIRST CIRCUIT'S DECISION DOES NOT HAVE BROAD NATIONAL EFFECT: MAINE IS THE ONLY STATE WHICH HAS ADOPTED A STATUTE PROHIBITING SOLICITATIONS BY OR ON BEHALF OF POLICE OFFICERS.

In 1977, when the Maine Legislature enacted the Solicitation by Law Enforcement Officers Act, no other state had legislation broadly prohibiting solicitations by or on behalf of law enforcement officers. In the sixteen plus years since the enactment of the Maine statute, Maine's legislation has retained its unique status. Unlike the decisions of this Court in granting certiorari in cases where the challenged statute was identical or similar to statutes in many other states, the statute here stands alone. *See New York v. Ferber*, 458 U.S. 747, 749 n.2 (1982) (certiorari granted where 47 other states had similar statutes); and *New York v. O'Neill*, 359, U.S. 1, 3 (1959) (certiorari granted where 42 other states had similar statutes).

The First Circuit's decision upholding the constitutionality of the Solicitation by Law Enforcement Officers Act will affect the Maine statute and only the Maine statute. The decision below will not have any broad national impact and does not justify full review by this Court.

CONCLUSION

For the reasons set forth above, the petition for writ of certiorari should be denied.

Respectfully submitted

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No. 93-1281

In The

Supreme Court of the United States

October Term, 1993

AUBURN POLICE UNION, et al.,

Petitioners,

v.

MICHAEL E. CARPENTER, ATTORNEY GENERAL OF THE STATE OF MAINE,

Respondent.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The First Circuit

PETITIONERS' REPLY MEMORANDUM

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Respondent.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The First Circuit

PETITIONERS' REPLY MEMORANDUM

I.

The Maine Attorney General, in his brief in opposition, addresses the question of "substantial overbreadth" and refers to the Maine statute's "hypothetical" application to solicitations by "private citizens unconnected with the police." (Brief in Opposition, pp. 10-11.) However, such an application is not merely hypothetical. Contained in the Joint Appendix on appeal to the First Circuit (at pp. 114-118) and also attached to the Stipulated Facts submitted to the District Court below, was the affidavit of a

Maine citizen, Ralph Midgett. (A copy of which is reproduced herewith in the Appendix.)

In his Affidavit, Mr. Midgett describes his efforts to create a fund to purchase bullet-proof vests for the Portland Police Department through private donations. Mr. Midgett states that contributions to the fund were made freely, without coercion, and no telethon or direct mail campaign was undertaken or necessary. (Appendix, p. 2a.) He states that contributions were made in response to the information conveyed by local newspaper articles. (*Id.*)

Mr. Midgett further states that the only record of contributors was kept by him alone, and that no police officer or organization indicated any interest in knowing who had or had not contributed, and that there would never be any arrangement to share that information with the police.

Mr. Midgett states in his affidavit that after speaking with the Attorney General's office, "the viability of the police vest fund itself appears to be in jeopardy because of the broad sweep of 25 M.R.S.A. § 3702."[1] (*Id.* at p. 3a.) Finally, he asserts that "because of the statute . . . my freedom to speak (about the fund) is severely chilled, if not outright prohibited." (*Id.*)

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[1] The Ralph Midgett affidavit was actually propounded and filed in the previous litigation, *Auburn Police Union v. Tierney*, 756 F. Supp. 610 (D. Me. 1991). However, the parties in this case ("Auburn II") attached the Midgett affidavit to their Stipulated Facts and agreed that Mr. Midgett "would testify as set forth in his affidavit."

Mr. Midgett's affidavit and experiences plainly illustrate the broad sweep of the prohibition against police solicitation. It is not a mere hypothetical, but the real life experience of a Maine citizen with the application of the statute. Although the fund was managed by a private citizen, and there was no solicitation or appeal for support, and although police officers would never know the identity of the contributors, the activity was still prohibited by the challenged statute.

Respondent in his brief states that the "district court specifically rejected these arguments in concluding that such solicitations did indeed create the risk of inherent coercion." (Brief in Opposition, p. 10.) However, this is not strictly accurate. The district court actually found that the prohibition was permissible because it countered "the pressure to acquire a public reputation of having financially supported the police." 798 F. Supp. at 825. The distinction is an important one, because the statute was upheld on the basis of a governmental purpose which the state has not asserted. In short, the district court's reasoning undermines the rule of strict scrutiny, by fabricating additional governmental interests not asserted by the state. The First Circuit also characterized solicitations by private citizens as "hypothetical" and seemed to disregard the existence of the Midgett affidavit in the Joint Appendix. 8 F.3d at 895.

II.

Respondent in his Brief in Opposition asserts that the First Circuit was bound by the summary dismissal of *State of Maine v. Maine State Troopers Ass'n*, 491 A.2d 538

(Me. 1985), *appeal dismissed*, 474 U.S. 802 (1985) ("*MSTA*") based upon this court's holding in *Hicks v. Miranda*, 422 U.S. 332, 343-45 (1975) and *Mandel v. Bradley*, 432 U.S. 173 (1977). Petitioners believe that the First Circuit was not so constrained. Inasmuch as § 3702-A sweeps within its proscription even spontaneous acts of independent citizens such as Ralph Midgett which are intended to benefit law enforcement officers, it is understandable that Respondent finds support in the holdings of *Hicks* and *Mandel*. However, Petitioners do not believe that these cases are as broad in their holdings as Respondent, and the First Circuit Court of Appeals, would assert. The limited scope of the precedential effect of summary dispositions was cogently summarized by this Court in *Washington v. Yakima Indian Nation*, 439 U.S. 463 (1979), *reh'd denied*, 440 U.S. 940 (1979):

> Our summary dismissals are, of course, to be taken as rulings on the merits, *Hicks v. Miranda*, 442 U.S. 332, 343-345, 95 S. Ct. 2281, 2288-2289, 45 L.Ed.2d 223, in the sense that they rejected the "specific challenges presented in the statement of jurisdiction" and left "undisturbed the judgment appealed from." *Mandel v. Bradley*, 432 U.S. 173, 176, ___ S. Ct. 2238, 2240, 53 L.Ed.2d 199. They do not, however, have the same precedential value here as does an opinion of this Court after briefing and oral argument on the merits, *Eidelman v. Jordan*, 415 U.S. 651, 670-671, 94 S. Ct. 1347, 1359-1360, 39 L.Ed.2d 662; *Richardson v. Ramirez*, 418 U.S. 24, 53, 94 S. Ct. 2655, 2670, 41 L.Ed.2d 551. A summary dismissal of an appeal represents no more than a view that the judgment appealed from was correct as to those federal questions raised and necessary to the

> decision. It does not, as we have continued to stress, *see*, e.g., *Mandel v. Bradley, supra*, necessarily reflect our agreement with the opinion of the court whose judgment is appealed. It is not at all unusual for the court to find it appropriate to give full consideration to a question that has been the subject of previous summary action.

Id. at 477, n.20. Petitioners submit that not only have decisions from this Court since the dismissal in 1985 of the appeal in *MSTA* "broken new ground," but in addition both the issues and facts presented in *MSTA* and in the case at bar diverge markedly. Of particular importance is the critical variable of "compelling governmental interest," the foundation essential to the decision of the Maine supreme judicial court in *MSTA*. Even if the First Circuit was correct in its application of *Hicks*, Petitioners urge that the resulting vindication of a statute so obviously repugnant to fundamental First Amendment values, suggests that re-visitation of the *Hicks* doctrine may be appropriate.

III.

Respondent in his brief asserts that since Maine is the only state in the union with such a broad prohibition on solicitations by or on behalf of law enforcement officers, the statute therefore has no "broad national effect." (Brief in Opposition, p. 15.) Respondent further argues that "in the sixteen plus years since the enactment of the Maine statute, Maine's legislation has retained its unique status." (*Id.*) This latter statement disregards the experiences of New Jersey with a similar statute in *Telco Communications v. Barry*, 731 F. Supp. 670 (D. N.J. 1990).

Respondent's premise also disregards the fact that the *amici curiae* in the First Circuit case below were, in addition to the Maine State Troopers Association, the National Association of Police Officers, a non-profit organization of the District of Columbia which represents approximately 135,000 state and local law enforcement officers; the National Troopers Coalition, an unincorporated association with principal offices in Albany, New York, which represents approximately 40,000 state troopers throughout the United States; and the Texas State Troopers Association, a non-profit corporation based in Austin, Texas consisting of approximately 2,050 members who are Texas state police.

Not only does the presence of these *amici* in the First Circuit below indicate the broad national effect of such a statute, but the acute public interest in all such legislation. The constitutionality of a state statute which prohibits fully protected speech would certainly seem of national importance. Even if local in its purview, the statute would have national effect upon any law enforcement group, such as the *amici* below, conducting a nationwide campaign for public support. Such national groups would simply not be able to telephone or mail into the state of Maine with an appeal for public support.

Accordingly, the statute, and the issues presented by this case, are of broad national impact.

Kansas City, Missouri
April 25, 1994

Respectfully submitted,

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UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF MAINE

AUBURN POLICE UNION, et al., Plaintiffs,	)	
v.	)	Case No. 90-0042 P
JAMES TIERNEY, Defendant.	)	

AFFIDAVIT OF RALPH MIDGETT

NOW COMES the affiant, under oath, and deposes and states as follows:

1. My name is Ralph Midgett. I am a resident and businessman in the Portland area, and since the autumn of 1989, I have been receiving public donations to a police vest fund.

2. My involvement in the fund was triggered by an article in the Portland Press Herald, written by Martha Englert, which reported that Portland police officers had begun paying for bullet-proof vests out of their own pockets because there was insufficient money in the budget to supply such vests at city or police organization expense.

3. That the policemen who protect us should thus also have to protect themselves bothered me, as it did others, and I contacted Martha Englert to tell her so.

4. Subsequently, Martha Englert wrote two follow-up articles (attached and made a part hereof as Exhibits 1 and 2), and the police vest fund came into being.

5. Individual and business contributions to the fund have been made freely, without coercion. No telethon or solicitation-by-mail campaign has been undertaken or been necessary. Rather, contributions have been made largely in response to the information conveyed in and by the above-described Press Herald articles.

6. The police vest fund exists solely for the purpose of buying bullet-proof vests for members of the Portland Police Department. The total cost of these vests – and the goal of this fund – is approximately $50,000.

7. One hundred percent of all contributions to the fund are going directly into the purchase of bullet-proof vests. In acknowledging each contribution, I have paid for stamps, envelopes, and enclosed acknowledgments myself. There neither have been nor will be any arrangement to reimburse me, much less otherwise compensate me. These have not been offered to me, and they are not desired by me.

8. Records of contributors are being kept by me and me alone. No police officer, police association, or police organization has indicated any interest in knowing who has or has not contributed. There has not been and will not be any arrangement to share that information with the police.

9. Shortly before the turn of the year, 1990, the Attorney General's office was called to find out whether a donated hot tub could lawfully be raffled to raise money for the police vest fund.

10. After that call, I refrained from organizing or encouraging a raffle of the hot tub. Moreover, since that call, the viability of the police vest fund itself appears to be in jeopardy because of the broad sweep of 25 M.R.S.A. § 3702.

11. This fund seems to me a good and necessary thing – certainly more free and less costly than another increase in Portland's property taxes, which to me are already high enough. If it were not so, I would not have involved myself with it. But because of a statute, 25 M.R.S.A. § 3702, my freedom to speak of it or about it is severely chilled, if not outright prohibited.

12. Because the fund came into existence, the bullet-proof vests are scheduled to be purchased by the Portland police this spring. I would like to see the purchase happen, and I give this affidavit in support of the pending request for an injunction against enforcement of the Police Anti-Solicitation Law, 25 M.R.S.A. § 3207. The facts stated hereinabove are based on my personal knowledge.

Dated:

/s/ Ralph Midgett
Ralph Midgett

STATE OF MAINE
CUMBERLAND, SS. April 25, 1990

Personally appeared the above-named Ralph Midgett, under oath, and attested to the truth of the statements hereinabove.

Before me,

/s/ Nancy M. Roberge
Notary Public
Attorney-at-Law
Nancy M. Roberge

MY COMMISSION EXPIRES
JUNE 23, 1990
